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No. _____

In The

Supreme Court of the United States

October Term, 1990

MAINE PUBLIC UTILITIES COMMISSION,

Petitioner,

v.

MAINE YANKEE ATOMIC POWER COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Judicial Court Court Of Maine

PETITION FOR A WRIT OF CERTIORARI

JAMES A. BUCKLEY*
General Counsel

DONALD J. SIPE
Staff Attorney

MAINE PUBLIC UTILITIES COMMISSION
242 State Street
State House Station #18
Augusta, Maine 04333
(207) 289-3831

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*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is it constitutionally permissible for a state where a nuclear power plant is located to establish the decommissioning funding requirements for that nuclear power plant when the federal government exercises ratemaking jurisdiction?

LIST OF PARTIES

The parties to the proceeding in the Maine Supreme Judicial Court were petitioner Maine Public Utilities Commission, the Industrial Energy Consumers Group and respondent Maine Yankee Atomic Power Company. Amicus Curiae briefs were filed by the Edison Electric Institute and Consumer-Owned Purchasers (of Maine Yankee power). The Maine Public Advocate participated in the administrative proceeding before the Maine Public Utilities Commission, but did not participate in the appeal to the Supreme Judicial Court of Maine.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

The Maine Public Utilities Commission petitions for certiorari to review the decision and order of the Supreme Judicial Court of Maine in this case.

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court is reported at 581 A.2d 799 and appears at Pet. App. A.[1] The decision of the Maine Public Utilities Commission is unreported but appears as Pet. App. B.

JURISDICTION

The case before the Supreme Judicial Court of Maine was decided and issued on October 25, 1990. This Court has jurisdiction to review the decision of the Maine Supreme Judicial Court under 28 USC § 1257(a)(1988).

STATUTORY PROVISION

The Nuclear Decommissioning Financing Act of Maine, 35-A M.R.S.A. §§ 4351-59, appears as Pet. App. C.

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[1] References to Pet. App. are to the appendix to this petition.

STATEMENT OF THE CASE

Maine law, the Nuclear Decommissioning Financing Act, 35-A M.R.S.A. §§ 4351-4359 (1988) (hereinafter referred to as "NDFA") requires that the Maine Public Utilities Commission (MPUC) establish a decommissioning financing plan for the Maine Yankee Atomic Power Plant that includes payments into an external fund to reflect the MPUC's determination of the estimated costs of decommissioning. The Maine Supreme Judicial Court struck down the NDFA as preempted by the ratemaking authority of the Federal Energy Regulatory Commission (FERC) and a pervasive federal scheme regulating decommissioning of nuclear power plants.

A. Decommissioning Required.

When a nuclear reactor reaches the end of its operating license, the United States Nuclear Regulatory Commission (NRC) requires the reactor to be "decommissioned." 53 Fed. Reg. 24018, 24019 (June 27, 1988). According to the NRC, decommissioning means "to remove nuclear facilities safely from service and to reduce residual radioactivity to a level that permits the release of the property to unrestricted use and termination of license." 10 C.F.R. § 50.2 (1990). Portions of the nuclear reactor vessel itself, the internal structure of the vessel and the shielding that surrounds the vessel are rendered radioactive by exposure to the fission process. The contaminated parts must be dismantled, transported from the site and buried at a federally licensed disposal facility. Transportation and burial costs for low-level

radioactive waste have sky-rocketed during the past decade. (R. 1389)

The NDFA requires any licensee operating a nuclear power plant within Maine to file a proposed decommissioning financing plan with the Public Utilities Commission and for the Commission to review that plan and ultimately approve a decommissioning plan. 35-A M.R.S.A. §§ 4351-4359 (1988). The primary purpose of the Act is to ensure that when it is time to decommission a nuclear power plant in Maine, adequate money is available to do the job. The Act requires the Commission to establish the cost of decommissioning and to establish a schedule of monthly payments into the decommissioning trust fund as necessary and convenient to meet the decommissioning cost at the time of closing. 35-A M.R.S.A. § 4353(4). The Commission must review the estimated cost of decommissioning at least every five years and based upon that review, revise the schedule of monthly payments as necessary. 35-A M.R.S.A. § 4354(6).

The only nuclear power plant located in Maine is the nuclear power plant in Wiscasset, Maine owned by the Maine Yankee Atomic Power Company, which in turn is owned by a group of investor-owned electric utilities (the sponsors) located in Maine, Massachusetts, New Hampshire, Connecticut and Vermont. Maine Yankee sells to the sponsors, at wholesale, its entire output of electricity. Because Maine Yankee sells electricity only at wholesale, the Federal Energy Regulatory Commission sets Maine Yankee's rates, pursuant to the Federal Power Act.

Maine Yankee has had decommissioning costs reflected by FERC in its rates since 1982.

B. The MPUC Proceeding Below.

The decommissioning plan filed by Maine Yankee with the MPUC included an estimated decommissioning cost of $167 million and annual payments into the trust fund of $9,073,943. Maine Yankee's proposed annual contribution and estimated cost were identical in amount to that stipulated to in a 1988 rate proceeding at the FERC. Maine Yankee's position was that the MPUC could not legally order an annual payment into the trust fund different than that reflected in its FERC-approved rates.

On February 22, 1990, the MPUC rejected Maine Yankee's position that the Commission was preempted from ordering decommissioning funding requirements different than FERC allowed in rates. The MPUC established the decommissioning funding requirement for Maine Yankee at $178,097,900, resulting in an order to Maine Yankee to increase its annual contributions to the decommissioning trust fund to $9,793,904. *Maine Yankee Atomic Power Co.*, Docket No. 82-179 (Me. PUC 1990).

C. The Appeal to the Supreme Judicial Court of Maine.

Maine Yankee appealed the Commission's February 22, 1990 order to the Supreme Judicial Court of Maine pursuant to 35-A M.R.S.A. § 1320. The Maine Court determined that federal law preempts the NDFA. The Maine Court issued its opinion and decision on October 25, 1990. Specifically, the Court found that the MPUC order and the NDFA are preempted for two reasons: (1) the February 22 order interferes impermissibly with FERC's jurisdiction over wholesale rates and (2) the NDFA

intrudes into the field of nuclear safety which has been pervasively and exclusively regulated by Congress.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted in this case (1) because of the national importance of decommissioning funding in general and because of the potential federal/state or multi-state conflict over decommissioning funding in particular[2] and (2) because the Maine Court's decision conflicts with the U.S. Supreme Court's decision in *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), and is contrary to the intent of Congress as expressed in the Federal Power Act and the Atomic Energy Act.

I. The Issue of State Involvement in the Economic Regulation of Decommissioning Funding is One of National Importance.

There has been much public debate of the merits of nuclear power. Over the past two decades, the debate has

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[2] The potential conflict exists whenever ratemaking jurisdiction over a nuclear power plant is vested in agencies beyond the borders of the state where the plant is located. For instance, a number of nuclear plants are owned in joint tenancy by more than one electric utility, the output of which is sold in more than one state. Thus, the nuclear power plant in Seabrook, New Hampshire is jointly owned by electric utilities in New Hampshire, Massachusetts and Connecticut. The Nuclear Decommissioning Financing Committee in New Hampshire orders all owners to contribute to the Seabrook decommissioning trust fund. N.H. Rev. Stat. Ann. ch. 162-F:14-26 (1989). Yet, ratemaking jurisdiction over the Massachusetts and Connecticut utilities is vested in each of those respective states or the FERC.

centered on whether nuclear power plants should be built; whether they should be operated even after construction was complete; and, because costs of construction escalated significantly in the late 1970s and 1980s, whether ratepayers or shareholders should pay for the extra cost. The public debate will undoubtedly continue, and over the next twenty years will include a new emphasis on decommissioning of nuclear power plants.

Prior to 1977, the NRC had done very little in establishing decommissioning requirements. In 1977, two events occurred which helped prompt the NRC to take some action. In June 1977, the U.S. General Accounting Office (GAO) issued a report that cited the lack of progress regarding decommissioning plans, radiation standards and radioactive waste disposal. GAO concluded that determination of who should pay for nuclear decommissioning costs represented "one of the biggest problems that may confront the public in the future." U.S. General Accounting Office, *Cleaning Up the Remains of Nuclear Facilities – A Multi-Billion Dollar Problem*, EMD-77-46, at 25 (June 16, 1977).

In July, 1977 a number of environmental and consumer groups submitted a petition for rulemaking to the NRC requesting that the NRC establish decommissioning funding standards. The NRC issued an "Advance Notice" of Rulemaking in 1978, and an actual proposed rule in 1985. A rule was finally promulgated in 1988. *General Requirements for Decommissioning Nuclear Facilities*, 53 Fed. Reg. 24018-56. (1988) (Amending 10 CFR Parts 30, 40, 50, 70 and 72.

The NRC has set the technical criteria which must be observed in order to assure adequate safety, including generic, minimum standards for funding. But the NRC rule was not designed and is not intended to be the exclusive means of establishing decommissioning funding levels. *See* 53 Fed. Reg. at 24037-24038.[3] The NRC specifically did not act to provide site-specific requirements.

There are 113 commercially licensed nuclear reactors producing electricity in the United States. NRC Information Digest, *NU Reg. 1350, Vol. II,* (March 1990). No large commercial nuclear reactor has yet been decommissioned. The largest reactor to have been decommissioned is the 72-MW Shippingport reactor at Shippingport, Pennsylvania. Maine Yankee by comparison, operates at 865-MW. Soon the industry will gain experience decommissioning some large plants. By 2010, almost one-third of the 113 reactors now operating are scheduled to retire. *Id.* For those plants, over one-half of the license life has elapsed. Moreover, the search for a disposal site for the spent fuel and other high-level radioactive waste, some of which is produced in the decommissioning process, and state or regional sites for low-level waste disposal is heightening the public awareness of the magnitude and urgency of the decommissioning planning, financial and otherwise, that soon must occur.

The decommissioning bill for these plants will be staggering. The total cost has been estimated to be $20

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[3] *See also* U.S. General Accounting Office, *Nuclear Regulation: NRC's Decommissioning Cost Estimates Appear Low,* RCED-88-184 (July 1988).

billion for the nuclear portion of the reactors alone, another $5 billion for the non-nuclear portion.[4] With such dollars at stake, it is not surprising that some state legislatures enacted statutes that require electric utilities to plan for this cost well in advance by setting aside the money that will be needed when the plant is shut down. Maine, California, Connecticut, New Hampshire and Illinois did so,[5] and other states may be expected to follow.

The states have a legitimate economic interest in assuring that nuclear power plants located on their soil will have the funds to pay for decommissioning. The Congress has recognized this interest. Under the Low Level Radioactive Waste Policy Act, 42 USC §§ 2021b-2021j (1988), it required each state be "responsible for providing, either by itself or in cooperation with other states, for the disposal of . . . low level radioactive waste generated within the State". 42 USC § 2021c(a)(1)-(a)(1)(A)(1988). In addition, the Act makes the state ultimately responsible, both financially and physically, for all low level waste in the event no

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[4] This figure is the estimate of the total cost by the nuclear utility industry. The NRC's minimum funding requirements are somewhat lower, about $12 billion in total. Some groups believe the industry's estimates are too conservative. Borson et al., *Payment Due: A Reactor-by-Reactor Assessment of the Nuclear Industry's $25+ Billion Decommissioning Bill*, (Public Citizen Critical Mass Energy Project, 1990).

[5] *See* Cal. Pub. Util. Code §§ 8321-8330 (West Supp. 1991); Conn. Gen. Stat. Ann. §§ 16-19m-16-19q (1988); N.H. Rev. Stat. Ann. ch. 162-F: 14-26 (Supp. 1989); Ill. Rev. Stat. ch. 111 2/3, § 8-508.1 (Supp. 1990).

provision for disposal is made by January 1, 1996.[6] For Maine Yankee, about 97% of the radioactive waste to be disposed of in the decommissioning process is low-level waste. (R. 2109, p. 103.)

The national importance of this problem is well recognized. Huge amounts of money are at stake, because decommissioning involves the disposal of radioactive waste. Yet adequate financial planning has been slow to occur and time is running out. Moreover, Congress has assigned ultimate responsibility for low-level waste to the States.

II. The Decision of the Maine Supreme Judicial Court that the NDFA is Preempted under the Supremacy Clause of the United States Constitution Conflicts with this Court's Ruling in *Pacific Gas & Electric v. Energy Resources Commission* and with Congressional Intent as Expressed in the Federal Power Act and the Atomic Energy Act.

Preemption analysis always starts with the presumption that Congress did not intend to displace state law.

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[6] 42 USC § 2021(d)(2)(c)(ii) provides in pertinent part:

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

The principles of preemption analysis have been well defined by this Court.

First, Congress can state explicitly the extent to which federal laws preempt state law. Second, in the absence of explicit statutory language, state law can still be preempted when a congressional intent can be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it" or where legislation "touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, state law is preempted to the extent that it actually conflicts with federal law. *English v. General Electric Company*, 495 U.S. ___, 110 S.Ct. 2270, 2275, 110 L. Ed 2d 65, 74 (1990).

Despite reciting these principles, the Maine Supreme Court fails to abide by them. The Court's holding that the NDFA is preempted rests upon two mutually inconsistent, although minimally articulated grounds. These grounds are:

1. That Maine's attempt to regulate decommissioning funding interferes with FERC's ratemaking authority and conflicts with FERC rate orders; and
2. That the NDFA intrudes into a field which has been pervasively regulated by Congress, presumably nuclear safety regulation, because:
    a. the NRC has conferred, by means of its safety rules and regulations, exclusive jurisdiction over decommissioning to

ratemaking agencies (in this case FERC); and

b. the NDFA is safety regulation which conflicts with NRC jurisdiction over safety matters.

The MPUC contends that setting site specific decommissioning amounts in accordance with NRC guidelines is neither ratemaking nor safety regulation, but rather, economic regulation as recognized by this Court in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983). The Maine Court's decision conflicts with *Pacific Gas & Electric*, misconceives the nature and sources of regulatory authority, and ignores the manifest intent of Congress in passing both the Federal Power Act and the Atomic Energy Act.

A. The Maine Act does Not Conflict with and is Not Preempted by FERC Rate Setting Authority under the FPA.

FERC derives its electric ratemaking jurisdiction from the Federal Power Act (FPA). There is no explicit mention of decommissioning in the FPA, and therefore, no explicit statement by Congress that FERC actions preempt state regulation on that subject.

The Federal Power Act as amended, 16 U.S.C. §§ 791-828c (1988), was originally passed in order to fill the regulatory gap left by the decision in *Public Utilities Commission v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927), which held that the states could not constitutionally set rates for sales of electricity at wholesale in interstate commerce. The Act was not intended to expand

the role of the federal government into areas of traditional state authority. *Connecticut Light and Power Co. v. FPC*, 324 U.S. 515, 525-531 (1945).

The extent of the FERC's jurisdiction, therefore, is to be measured by the extent of the regulatory gap left by the commerce clause cases such as *Attleboro*, and the FPA must be given preemptive effect only to the extent necessary to protect the achievement of the aims of the federal statute. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117, 127 (1964).

FERC's primary responsibility is to regulate interstate and wholesale rates. The Maine Court held that the NDFA impermissibly interfered with FERC rate setting authority. *Maine Yankee v. MPUC*, 581 A.2d at 805. The Court simply assumed that imposing decommissioning cost requirements was a ratemaking function. For instance, the Maine Court states that decommissioning funding level is a stated amount which cannot vary without FERC approval, citing various FERC cases. *Id.* at 803-804. These FERC cases, however, merely determine the particular kind of FERC-defined rate schedule upon which decommissioning expenses should be charged to wholesale ratepayers, namely a "stated" rate rather than "formula" rate. Astonishingly, if FERC had classified decommissioning costs as part of a formula rate, a rate which by definition can vary without specific FERC approval, evidently the Maine Court would have held that decommissioning funding is not ratemaking. The distinction between formula and stated rates is irrelevant to the preemption analysis. It is true that given formula rate treatment, variations in cost will be immediately reflected in rates and thus will never affect return on

equity. Of course, if the NDFA were upheld, it would be logical for the FERC to classify decommissioning funding costs imposed by Maine as a formula rate, similar to the FERC's treatment of other state-imposed costs.

More importantly, Congressional intent does not hinge upon how decommissioning costs are categorized by FERC. The Maine Court does not provide any reasoning to support its conclusion that decommissioning funding is strictly a ratemaking function. Rather, the Court simply assumed away the critical issue in this case, namely whether *Congress intended* that decommissioning funding be strictly a ratemaking function.

The decommissioning financing tasks that have been delegated to the Public Utilities Commission by the Maine Legislature are not ratemaking in nature. The state regulation involves developing an estimate of the site-specific costs of returning a parcel of land in Wiscasset, Maine, to a condition fit for unrestricted public use in accordance with NRC guidelines. A proper determination of the costs of decommissioning a nuclear site is unaffected by any consideration of the utility's rate of return, depreciation, expenses, rate structure, or any other component or element of its cost of service. It is not rate regulation. Decommissioning financing is an imposition of cost upon a utility, not of rates upon ratepayers.[7]

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[7] If the NRC had implemented the same decommissioning funding requirements as the MPUC did on February 22, 1990, the NRC action would be valid. Yet, the NRC would thereby require Maine Yankee to increase funding levels without FERC approval, would reduce the rate of return earned by Maine

(Continued on following page)

There are several costs of doing business which state law imposes upon Maine Yankee: worker's compensation, corporate income tax, sales tax, property tax, and licensing fees for vehicles and equipment and many other economic and environmental regulations. These costs are imposed upon Maine Yankee and are reflected in its rates by FERC because they come within the legitimate scope of state authority and police power. But for all their undoubted effect upon the rates that Maine Yankee charges, they are costs and not rates.

Yet the Maine Court held that the MPUC action was "impermissible" because it decreased the amount of earnings realized by Maine Yankee's sponsors and weakened the Company's financial base. *Maine Yankee v. MPUC*, 581 A.2d at 804. In short, the Maine Court held State action preempted because it would have a temporary impact upon the profitability of producing nuclear power in the State of Maine – a purely economic impact. This Court has held in *Pacific Gas* that "the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 at 223 (1983).

(Continued from previous page)

Yankee shareholders, and create the same conflict between the FERC, March 15, 1988 rate order as the MPUC action on February 22, 1990. The NRC increased funding requirement would be valid, however, because decommissioning funding is not ratemaking and there is no impermissible conflict between the FERC order and the hypothetical NRC order. If it is not ratemaking when the NRC sets *minimum* funding requirements, it is likewise not ratemaking when Maine sets site-specific decommissioning funding requirements.

If economic regulation of nuclear power by the states is permissible, then such regulation cannot be held invalid on the grounds that it has an economic impact. Yet the Maine Court did so.

B. The Decision of the Maine Supreme Judicial Court that the Maine Act intrudes upon a field which has been pervasively regulated by Congress, conflicts with this Court's decision in *Pacific Gas & Electric v. Energy Resources Commission*.

The Supreme Court has recognized that the economic regulation of nuclear power has been left to the States as long as that regulation does not impinge upon NRC's safety jurisdiction. In *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), the Court discussed the preemptive scope of the Atomic Energy Act:

> [A]s we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibilities in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns.

461 U.S. at 205.

The Nuclear Regulatory Commission has exclusive and complete control over the health and safety aspects of nuclear decommissioning. The NDFA itself recognizes the preeminent role to be played by the federal

government in this area.[8] The opinion in *Pacific Gas & Electric*, however, makes it clear that the States are granted great latitude as long as they do not attempt to intrude upon the jurisdiction of safety matters granted to the NRC.

In its pervasive scheme analysis, the Maine Court found decommissioning funding to be a matter of safety regulation, and to be within the exclusive jurisdiction of the NRC, citing *Pacific Gas & Electric. Maine Yankee v. MPUC*, 581 A.2d at 806. The Court apparently reasoned that the NRC has delegated its exclusive jurisdiction over safety matters in the sphere of decommissioning funding to ratemaking agencies:

> NRC's rule amendments permit the appropriate state or federal rate-setting agency to regulate funding for decommissioning; in the case of *wholesale* rate setting that agency would be FERC. [53 Fed Reg.] at 24037-38.

581 A.2d at 805.

First, a reading of the NRC rule simply does not support the assumption that the NRC either attempted or intended to delineate the spheres of influence between

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[8] See, e.g., 35-A M.R.S.A. § 4353(4) ("For purposes of cost estimates, the method of decommissioning shall be the method of prompt removal and dismantlement, unless the United States Nuclear Regulatory Commission . . . requires another method.") 35-A M.R.S.A. § 4353(7) (" . . . the commission (PUC) may not duplicate the health and safety review conducted by the United States Nuclear Regulatory Commission . . . .").

state and federal authority over site-specific decommissioning funding.[9]

Second, this assumption is made without any analysis of the NRC's authority to delegate its preemptive, exclusive jurisdiction to other federal or state agencies. No such authority exists. Congress, not the NRC, determines the extent of FERC's jurisdiction. In *Pacific Gas & Electric*, this Court recognized that states retain their traditional authority over economic aspects of nuclear power. The NRC cannot preempt that traditional authority by "delegating" its exclusive jurisdiction to another agency. If the NRC itself has not preempted state action in setting site specific cost estimates, it cannot empower the FERC to do so.

By assuming this interagency transfer of exclusive jurisdiction, the Maine Court's analysis ignores the crucial question of whether *Congress* intended the FERC, primarily a rate setting body established to deal with those matters which are beyond the pale of effective state supervision,[10] to override the State's authority to financially plan for the safe decommissioning of a nuclear power plant located on its own soil. What the NRC may have assumed or intended is not relevant to the extent of

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[9] 10 C.F.R. § 50.75(a) (1990) simply reads:

> Funding for decommissioning of electric utilities is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation."

[10] *See Connecticut Light and Power Co. v. FPC*, 324 U.S. at 525-531.

FERC jurisdiction. The NRC has not been granted authority to expand the preemptive scope of FERC regulation by means of its rules. The preemptive effect of any federal regulation is limited by the authority legislatively granted because "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986).

The NDFA does not conflict with NRC safety regulations. As noted above, it recognizes the NRC's complete jurisdiction over decommissioning methods, funding regulations and minimum funding amounts. The question before this Court, ignored by the Court below, is whether *Congress intended* the FERC to have preemptive authority in the field of nuclear decommissioning financing by virtue of its *rate* setting authority. This Court's opinion in *Pacific Gas* recognizes Congressional intent "that the states retain their traditional responsibilities in the field of regulating electric utilities for determining questions of need, reliability, cost and other related state concerns." 461 U.S. at 205. The setting by Maine of a site-specific decommissioning amount in accordance with NRC guidelines for a nuclear power plant located on its own soil is legitimate economic regulation of nuclear power in accordance with the holding of *Pacific Gas*.

CONCLUSION

For the reasons stated, certiorari should be granted in this case.

Respectfully submitted,

JAMES A. BUCKLEY*
General Counsel

DONALD J. SIPE
Staff Attorney

Attorneys for
Maine Public Utilities Commission
*Counsel of Record

January, 1991

APPENDIX A

MAINE YANKEE ATOMIC POWER COMPANY

v.

MAINE PUBLIC UTILITIES COMMISSION

Argued September 18, 1990
Decided October 25, 1990

Before ROBERTS, WATHEN, GLASSMAN, CLIFFORD, COLLINS, and BRODY, JJ.

WATHEN, J.

Maine Yankee Atomic Power Company ("Maine Yankee") appeals the February 22, 1990 order of the Maine Public Utilities Commission ("MPUC") purporting to establish Maine Yankee's cost of decommissioning and to fix the amounts which Maine Yankee must pay annually to its decommissioning trust fund, pursuant to Maine's Nuclear Decommissioning Financing Act ("NDFA"), 35-A M.R.S.A. §§ 4351-4359 (1988).

At the heart of this appeal lies a jurisdictional issue. Maine Yankee maintains that a federal agency, the Nuclear Regulatory Commission ("NRC"), has exclusive jurisdiction over nuclear decommissioning which it exercises in conjunction with the ratemaking agency, the Federal Energy Regulatory Commission ("FERC"). The MPUC, however, asserts that it has concurrent jurisdiction to review and approve any proposed decommissioning financing plan, pursuant to the NDFA. We determine that federal law preempts the NDFA.

Maine Yankee, a licensed nuclear electric generating facility in Wiscasset, is owned by a group of investor-owned electric utilities ("the sponsors") located in Maine,

Massachusetts, New Hampshire, Connecticut, and Vermont. Maine Yankee sells to these sponsors, at wholesale, its entire output of electricity on a basis proportional to each sponsor's ownership of the company.

Pursuant to the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, the NRC is statutorily mandated "to protect the radiological health and safety of the public." General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24018, 24037 (1988). In keeping with this mandate, the NRC promulgated a rule requiring

> reasonable assurance that at the time of the termination of operations [of nuclear facilities] adequate funds are available so that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems.

Id. On July 27, 1988, the NRC's general requirements for decommissioning nuclear facilities became effective. *Id.* at 24018-19.

Although the NRC is not authorized to regulate rates or to interfere with the decisions of state or federal agencies respecting the economics of nuclear power, the NRC is responsible for promulgating "rules prescribing allowable funding methods for meeting decommissioning costs." *Id.* (citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190, 212-13, 217-19 (1983)). In setting forth technical and financial criteria for decommissioning licensed nuclear facilities, the NRC took care to clarify the roles of the state

public utility commissions and the Federal Energy Regulatory Commission. To FERC the NRC ascribes

> the responsibility for setting rates for the *transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce* and authorizes the conditions, rates, and charges for interconnections among electric utilities. . . . State public utility commissions have the responsibility for setting rates for *retail* sales of electricity to homeowners and companies doing business in their states.

53 Fed. Reg. at 24037-38 (emphasis added). As a company engaged in the "transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce," Maine Yankee is subject only to the jurisdiction of FERC for the regulation of its utility service and rates. The rates fixed by FERC provide for the costs of operating the plant as well as a return through depreciation of Maine Yankee's investment in the plant. Thus, Maine Yankee asserts that FERC has jurisdiction over its decommissioning plan since "decommissioning expenses have historically been and continue to be treated by FERC as depreciation and booked as negative salvage."

On October 5, 1981, Maine Yankee made a rate increase filing with FERC, seeking "to reflect in its rates the estimated costs of decommissioning" its nuclear generating plant. *Maine Yankee Atomic Power Company,* 20 F.E.R.C. ¶61,141 at p. 61,308 (1982). On October 29, 1981, the MPUC filed a notice of intervention with FERC and took the position that Maine Yankee should "supplement or modify its filing with a 'rate schedule' which provides for (1) the billing of decommissioning costs in accordance with the method approved by the M.P.U.C. . . . and (2) the

segregation of decommissioning funds in a separate account to be used solely for decommissioning purposes." On March 30, 1982, Maine Yankee filed a proposed settlement agreement which attempted to resolve the issues in the subsequent FERC proceeding. *Id.* Meanwhile, on April 15, 1982, the Maine Legislature enacted the Nuclear Decommissioning Financing Act, now codified at 35-A M.R.S.A. §§ 4351-4359 (1988). The NDFA creates a specific mechanism for establishing a decommissioning financing plan and requires any licensee operating a nuclear power plant in Maine to file a proposed plan with the MPUC for review and ultimate approval. *Id.* at § 4353(1-3).

On August 3, 1982, FERC issued its order approving the March 30, 1982 settlement agreement and expressing the view, with regard to the NDFA, that there should be "consistency with the states . . . to the extent that it allows us to properly carry out our duties under the Federal Power Act." *Maine Yankee Atomic Power Company,* 20 F.E.R.C. at p. 61,310. The MPUC did not appeal this order. Since that time, Maine Yankee and the other parties to this litigation, including the MPUC, have participated in litigated FERC proceedings in 1985 and 1988. *Maine Yankee Atomic Power Company,* 31 F.E.R.C. ¶61,068 (1985); *Maine Yankee Atomic Power Company,* 44 F.E.R.C. ¶61,368 (1988). In each of these cases, the parties negotiated the appropriate cost estimate and funding level for decommissioning expenses and reached a binding settlement; no appeals were taken.

On September 13, 1982, Maine Yankee filed its proposed decommissioning financing plan with the MPUC; on November 12, 1982, the MPUC notified the company

that its filing was incomplete; and on December 7, 1982, the MPUC granted Maine Yankee's request for additional time to supplement its filing. Since then, both parties continued to process the case, but no final plan was ever approved by the MPUC. On August 29, 1983, the MPUC approved a stipulation entered into by the parties as an interim decommissioning financing plan.

On January 15, 1988, Maine Yankee petitioned FERC to modify the period over which it would collect decommissioning costs to 10 years, increase its annual decommissioning charges accordingly, and decrease the level of return on common equity that the company could collect. *Maine Yankee Atomic Power Company*, 42 F.E.R.C. at p. 61,920. According to Maine Yankee, these changes "would have permitted the company to fix decommissioning expense based on Maine Yankee's most recent estimate of $178,097,900 and to fund for decommissioning expense at the level of $14,466,467 per year over the course of ten years." On February 8, 1988, the MPUC filed an intervention, making it a party to the proceeding. *Id.*, at p. 61,320-21. In its March 15, 1988 order, FERC rejected Maine Yankee's proposed accelerated decommissioning schedule and required the company to "file revised rates, reflecting recovery of decommissioning costs over the nuclear unit's remaining life." *Id.* at p. 61,923.

On July 27, 1988, Maine Yankee submitted an uncontested settlement agreement which FERC approved on September 20, 1988, establishing a decommissioning cost basis of $167,000,000 and a fixed rate of return on common equity at 12.9%. *Maine Yankee Atomic Power Company*, 44 F.E.R.C. ¶61,368 at p. 62,224 (1988). In addition, the parties agreed to a "stay-out" provision prohibiting

Maine Yankee from making "a filing to place into effect prior to February 16, 1991, any increase in the level of annual decommissioning charges above that stated in [the settlement agreement]."

On March 20, 1989, Maine Yankee moved that the MPUC approve an amendment to the August 29, 1982 interim decommissioning financing plan which reflected the provisions of the September 20, 1988 FERC order, converting it into an MPUC-approved decommissioning finance plan. On November 17, 1989, hearings began on the issue, and, on November 29, 1989, Maine Yankee, the Public Advocate, and the Industrial Energy Consumer Group ("IECG")[1] filed a stipulation of the issues in the case. On February 22, 1990, the MPUC rejected the stipulation and Maine Yankee's decommissioning financing plan, finding that "$178,097,900 is the most reasonable estimated cost of decommissioning," and ordered that Maine Yankee increase, effective March 1, 1990, its annual contributions to the decommissioning trust fund by $719,961, for a total contribution of $9,793, 904.

On March 23, 1990, the MPUC stated that additional funding amounts required under its February 22, 1990 order must be supplied from Maine Yankee's assets or the

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[1] The Industrial Energy Consumer Group ("IECG") is an incorporated association of large industrial consumers of energy located within the State of Maine. Its members are Champion International, International Paper Company, Keyes Fibre Company, United Timber Corporation, Cyro Industries, the Maine Textile Council, Boise Cascade Corporation, Forester Manufacturing Company and James River Corporation. A petition to intervene was filed by this group on May 24, 1989, and subsequently granted.

assets of the sponsors, and granted a request to stay the February 22, 1990 order pending Maine Yankee's appeal to this Court.

The supremacy clause of the United States Constitution provides that the law of the United States "shall be the supreme Law of the Land. . . . U.S. Const. art. VI, cl. 2. Thus under certain circumstances, federal law will preempt even validly enacted state law. In the recent case of *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990), we reiterated the principles of preemption:

> "Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

Id. at 1191 (quoting *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. 355, 368-69 (1986) (citations omitted)). The exercise of federal supremacy should not be presumed lightly. *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d at 1191. Nevertheless, when no other conclusion is possible given the nature of the regulated subject matter, or Congress has clearly ordained this result, federal law must preempt conflicting state law. *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1057 (Me. 1986).

Preemption occurs whenever state law conflicts with federal law in such a way that it becomes impossible to comply with both simultaneously. *California v. F.E.R.C.* No. 89-333, slip op. at 4 (S. Ct. May 21, 1990) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)); *see also Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145, 1151 (1988). Such a conflict "may be direct, in that the state regulation obviously contradicts federal regulation, or it may arise from Congressional intent, either express or implied, to occupy a particular area." *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d at 1057. Courts must first ascertain the objectives of Congress before determining whether a state statute hinders the achievement of federal policy. *Bayside Enterprises v. Maine Agricultural Bargaining Board*, 513 A.2d 1355, 1358 (Me. 1986).

A federal agency acting within the scope of its congressionally delegated authority may also preempt state regulation. *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. at 369; *see also Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.") Thus, if the NRC and FERC are acting within the scope of their congressionally delegated authority in asserting exclusive jurisdiction over Maine Yankee's decommissioning plan, the MPUC order and the NDFA are preempted.

Maine Yankee claims that the MPUC order and the NDFA should be preempted because (1) they interfere impermissibly with FERC's jurisdiction over wholesale rates and (2) they intrude on a field which has been pervasively and exclusively regulated by Congress.

1. Impermissible interference with FERC's jurisdiction

It is undisputed that FERC has jurisdiction for setting rates for "the transmission and sale (wholesale) of electricity by investor-owned utilities in interstate commerce." 53 Fed. Reg. at 24037-38; *see also Mississippi Power & Light Co. v. Moore*, 108 S. Ct. 2428, 2439 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates."). Maine Yankee argues that the MPUC order directly conflicts with the valid exercise of this ratemaking jurisdiction in several significant respects.

FERC's March 15, 1988 rate order included four specific components of Maine Yankee's costs of service: 1) the rate of return on common equity; 2) amortization of materials and supplies and last core nuclear fuel; 3) decommissioning expense; and 4) other depreciation. The MPUC order, retroactive to March 1, 1990, alters the effect of this order, fixing Maine Yankee's decommissioning expense at $719,961 more per year than the March 15, 1988 FERC order and providing for Maine Yankee's sponsors a lower rate of return.

The decommissioning funding level is a stated amount which cannot vary without FERC approval. *Central Vermont Public Service Corp.*, 44 F.E.R.C. ¶61,278 at p. 62,027 (1988); *see also Yankee Atomic Electric Co.*, 30 F.E.R.C. ¶61,111, at 61,202 (1985). It is one cost of service component which contributes to the establishment of Maine Yankee's utility rate. Under the "filed rate doctrine" developed under federal law, a federally regulated utility is precluded from collecting any rate other than that on file with the Commission, and the MPUC cannot

interfere with the rate set by FERC or the components that go into it. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986); *see Mississippi Power & Light Co. v. Moore*, 108 S.Ct. at 2438-39.

FERC has held that decommissioning expense, like depreciation, should be collected from ratepayers as a cost of service. *Indiana and Michigan Municipal Distributors Association v. Indiana Michigan Power Co.*, 49 F.E.R.C. ¶63,020 at p. 65,084 (1989); *Middle South Energy, Inc.*, 31 F.E.R.C. ¶61,305 at p. 61,685 (1985). Pursuant to the "stay-out" provision in the March 15, 1988 FERC order, however, Maine Yankee cannot file for a rate increase that would become effective prior to February 16, 1991. Thus, the company is prevented from raising the revenues necessary to meet the demands of the MPUC order, retroactive to March 1, 1990, by FERC's requirement that decommissioning costs come from ratepayers and Maine Yankee's agreement to delay any rate increase until after February 16, 1991. Given this scenario, it is impossible for Maine Yankee to comply with both the March 15, 1988 FERC order and the February 22, 1990 MPUC order. Applying the principles of preemption set forth earlier, the MPUC order is preempted.

Contrary to FERC policy, the MPUC has directed Maine Yankee to raise revenues from the company's own assets and the assets of its sponsors. FERC fixed the rate of return for Maine Yankee's sponsors at 12.9% in the March 15, 1988 order. In requiring that additional funding for decommissioning come from the assets of Maine Yankee and its sponsors, the MPUC is impermissibly mandating a reduction in the sponsors' rate of return and weakening the company's financial base. The MPUC has

no authority to require a reduction in a component of Maine Yankee's rates, set exclusively by FERC. Any attempt to do so is preempted by FERC. *See Safe Harbor Water Power Corp. v. Federal Power Comm.*, 179 F.2d 171, 201 (3rd Cir. 1949) ("The amount of rate of return is preeminently a question for determination by the Commission."[2]); *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (Setting valid rates enables a company "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed.")

Without merit is the MPUC's assertion that its order does not interfere with rate setting, but, like a state income tax, merely affects Maine Yankee's rates indirectly. The United States Supreme Court has held that "the filed rate doctrine is not limited to 'rates' *per se*." *Nantahala v. Thornburg*, 476 U.S. at 966. In *Mississippi Power & Light Co. v. Moore*, the Court stated that FERC's exclusive jurisdiction applies not only to rates, but to the components that affect wholesale rates. *Mississippi Power & Light Co. v. Moore*, 108 S. Ct. at 2439 ("FERC's exclusive jurisdiction applies not only to rates, but also to power allocations that affect wholesale rates.") While in that case the component at issue was power allocations, the principle applies equally well to decommissioning financing. Both directly affect the calculation of reasonable

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[2] The Federal Power Commission ("FPC") was FERC's predecessor as a ratemaking agency. Responsibility for the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy was transferred from the FPC to FERC by sections 717(a)(1)(B) and 7293 of Title 42, The Public Health and Welfare. 16 U.S.C. § 824a (1985).

wholesale rates over which FERC exercises exclusive jurisdiction. Furthermore, the impact of the decommissioning financing plan imposed by the MPUC cannot validly be compared to the impact of a state tax. State taxes are not set by the federal government while Maine Yankee's decommissioning expenses are and have been set by FERC.

Thus, the MPUC order and the NDFA interfere impermissibly with FERC's exclusive jurisdiction over wholesale rates and are preempted by the supremacy clause of the United States Constitution.

2. *Intrusion on a field which has been pervasively and exclusively regulated by Congress*

When Congress has manifested an intent to occupy a particular area through a comprehensive scheme of federal regulation, federal law will preempt state regulation in that area. Congressional intent to occupy an area of law

> may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." . . . [E]ven where Congress has not entirely displaced state regulation in a particular field, state law is preempted when it actually conflicts with federal law.

Schneidewind v. ANR Pipeline Co., 108 S. Ct. at 1150 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. 190 (1983), the Supreme Court made it clear that state regulation of nuclear power is preempted when its purpose is to regulate safety, even when it does not directly conflict with federal law, because "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Id.* at 212. Since the passage of the Atomic Energy Act in 1954, Congress has preserved a dual system of regulation, with the federal government maintaining "complete control of the safety and 'nuclear' aspects of energy generation" and the states exercising traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, [retail] ratemaking, and the like." *Id.*

Maine Yankee argues that "federal law governs nuclear decommissioning chiefly through three interrelated regulatory schemes:" (1)Nuclear Regulatory Commission regulations; (2) certain provisions of the Federal Power Act; (3) section 468A of the Internal Revenue Code.

The MPUC concedes that the NRC has exclusive control over the health and safety aspects of nuclear decommissioning. It disputes, however, the validity of Maine Yankee's assertion that NRC's jurisdiction extends to the economics of decommissioning.

Economic regulation of nuclear power has traditionally been granted to the states. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. at 212. Nevertheless, the NRC has

acknowledged its authority, granted by the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended, to

> take whatever regulatory actions may be necessary to protect the public health and safety, including the promulgation of rules prescribing allowable funding methods for meeting decommissioning costs. The fact that these regulatory actions may have an economic impact does not mean that they lie outside NRC's jurisdiction.

53 Fed. Reg. at 24037 (citations omitted). NRC's rule amendments permit the appropriate state or federal rate-setting agency to regulate funding for decommissioning; in the case of *wholesale* rate setting, that agency would be FERC. *Id.* at 24037-38.

The Federal Power Act, 16 U.S.C. §§ 824-825, declares that there will be federal regulation "of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," provided this regulation extends "only to those matters which are not subject to regulation by the States." *Id.* at § 824(a). In this case, the decommissioning of an atomic power plant engaged in the wholesale marketing of electricity in interstate commerce is not a matter subject to regulation by the state. Thus, by the authority of the Federal Power Act, state regulation must be preempted in this area.

It is undisputed that FERC requires utilities over which it exercises jurisdiction to follow I.R.C. § 468A (1988) which permits deductibility of amounts contributed to the decommissioning trust fund only to the extent such expense is included in rates. Maine Yankee contends

that FERC's incorporation of IRC § 468A into the FERC regulatory scheme, as occurred in *Systems Energy Resources, Inc.*, 37 F.E.R.C. 61,261 (1986) ("SERI") "shows that the IRS regulations are not only a direct federal oversight of decommissioning fund policy, but are also inextricably interwoven into FERC's exercise of its own jurisdiction." *Id.* at 61,726-27. The MPUC disputes this contention, claiming that Maine Yankee has failed to show that this incorporation indicates that Congress has granted IRS federal oversight of decommissioning fund policy. In either case, this issue is not determinative as it has already been shown that Congress intended to dominate the field of nuclear safety concerns.

When "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose" as those sought by state regulation, the state regulation is preempted. *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. at 1150 (citation omitted). In enacting the NDFA, the Legislature stated that "timely proper decommissioning of any nuclear power plant . . . is essential to protect public health, safety and the environment." 35-A M.R.S.A. at § 4351. Because Congress has clearly manifested an intent to maintain "complete control over the safety and 'nuclear' aspects of energy generation," the NDFA is preempted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm.*, 461 U.S. at 212.

The entry is:

The February 22, 1990 order is vacated.

All concurring.

APPENDIX B

STATE OF MAINE PUBLIC UTILITIES COMMISSION

Docket No. 82-179
February 22, 1990

MAINE YANKEE ATOMIC POWER COMPANY Re: Decommissioning Financing Plan

ORDER

GORDON, Chairman; HARRINGTON and PAINE, Commissioners

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I. PROCEDURAL HISTORY

The Maine Legislature in 1981 enacted the Nuclear Decommissioning Financing Act (NDFA) (now codified at

35-A M.R.S.A. §§ 4351-4359), which requires any licensee of a nuclear power plant in Maine to establish an external trust fund and contribute sufficient money into that fund to pay the ultimate cost of decommissioning the plant at the end of its useful life. Section 4351(1) describes the underlying purpose of this legislation: "the Legislature finds that timely proper decommissioning of any nuclear power plant beginning at the time of its closing is essential to protect public health, safety and the environment and that the cost of decommissioning will be significant." On September 13, 1982, Maine Yankee Atomic Power Company filed its decommissioning financing plan with the Commission. On November 12, 1982, the Commission notified Maine Yankee that its filing was not complete because Maine Yankee failed to provide all of the information required by 35-A M.R.S.A. § 3353(2). The Commission directed Maine Yankee to correct these deficiencies within 30 days. On December 7, 1982, the Commission granted Maine Yankee's request for additional time to supplement its filing and correct the deficiencies of its filed plan.

During the next several years, Maine Yankee supplemented its filing, including obtaining the necessary agreements between the licensee and each owner of the licensee as to ultimate financial responsibility for decommissioning. Maine Yankee has also twice filed new decommissioning cost studies, both of which were prepared by TLG Engineering, Inc. The first new study was filed on June 30, 1983, and the latest such study was done in December, 1987 and filed with the Commission on March 20, 1989.

Because of the deficiencies in Maine Yankee's original filing, no plan was ever finally approved by the Commission. Section 3353(5)(B) (now codified at 35-A M.R.S.A. § 4353(5)(B)) required that the Commission promulgate an interim decommissioning financing plan one year after the effective date of the Act if a plan had not been finally approved by the Commission. Pursuant to this requirement, the parties to this case at that time, the Staff, Public Advocate and Maine Yankee entered into a Stipulation on August 16, 1983, which provided that the then present arrangement, namely that Maine Yankee's recovery of $1,826,100 annually to cover projected decommissioning costs from customers of Maine Yankee pursuant to an Order Approving Settlement issued by the FERC on August 3, 1982, constituted a reasonable interim plan pending completion of the Commission's review of the permanent plan in this docket. On August 29, 1983, the Commission approved the Stipulation and thereby ordered it into effect pending final resolution of this proceeding.

In 1988, Maine Yankee petitioned FERC to approve a new wholesale rate which would have permitted Maine Yankee to collect the total cost of decommissioning at the rate of $14,466,467 per year over the course of 10 years for a total decommissioning cost of approximately $178,000,000. Maine Yankee's plan thus essentially was based on a reduction of the recovery period from 20 to 10 years. FERC summarily rejected Maine Yankee's rate filing. FERC subsequently ruled that the proper period for recovering decommissioning costs was the licensed life of the plant. 44 F.E.R.C. ¶ 61,453 (1988). Subsequently FERC approved a stipulation that permits Maine Yankee to

recover $9,073,943 per year in rates for a total recovery of $167,000,000 in 1987 dollars. The stipulation, signed by Maine Yankee, the Public Advocate and the Municipal Customer Group and approved by FERC also included a "stay out" provision prohibiting Maine Yankee from filing for recovery of increased decommissioning costs before January 1991.

On March 20, 1989, Maine Yankee filed a Motion to Amend Interim Decommissioning Financing Plan and to Approve the Interim Plan as Amended as the Final Decommissioning Financing Plan. The Motion requested the Commission to approve the amendments to the Company's interim decommissioning financing plan and then convert the interim decommissioning financing plan as amended to an approved decommissioning financing plan under 35-A M.R.S.A. § 4353(3). The amendments offered include the latest (1987) engineering study by TLG Engineering, Inc. to estimate the decommissioning cost. The 1987 study concludes that the total cost of decommissioning the plant utilizing the prompt removal and dismantlement technique is $178,073,900, including a 25% contingency allowance. The study also updates information concerning the insurance obtained by Maine Yankee in 1984 in the nature of all nuclear property damage insurance and sponsor guarantees to pay decommissioning costs in full.

On May 2, 1989, the Commission published Notice of Maine Yankee's Motion in newspapers of general circulation in Maine Yankee's customer's service areas in Maine and the Examiner issued a Procedural Order to the same effect. The Notice and Procedural Order set a deadline for petitions to intervene of May 24, 1989. A petition to

intervene was filed by the Industrial Energy Consumers Group and was subsequently granted. The other parties to this proceeding are Maine Yankee, Staff and the Public Advocate. On May 12, 1989, the Administrative Director, acting in accordance with 35-A M.R.S.A. § 4353(3)(D), found Maine Yankee's filing to be complete.

On September 8, 1989, a prehearing conference was held in this proceeding. At this conference it became apparent that significant differences of opinion existed among the parties concerning the possible preemptive effect of the 1988 FERC settlement order on the scope of the Commission's authority to act pursuant to the NDFA. A public witness hearing was also held on September 8, 1989 at which one public witness testified, Mr. Phillip Merletti.

On October 12, 1989, Maine Yankee filed a Motion for a Prehearing Order and Motion *In Limine* with supporting memoranda. Maine Yankee sought in its Motion, *inter alia*, a ruling from the Examiner concerning the scope of any evidentiary hearing held on the merits of Maine Yankee's proposed final decommissioning financing plan. Specifically, Maine Yankee requested that any issues relating to increasing the level and accelerating the collection of funds for decommissioning be excluded from this proceeding because the Commission is preempted by federal law from ordering changes to the level or timing of collection of funds for decommissioning.

The Commission, on October 24, 1989, issued an Order concerning the time within which a final decision was required by statute to be issued. Pursuant to section 4353(3)(D) the Commission "shall take final action" on

the proposed decommissioning financing plan within 180 days after the filing date. Because the Commission found the filing complete on May 12, 1989, the statutory deadline for "final action" became November 8, 1989. In its October 24 Order, however, the Commission recognized that Maine Yankee's Motion *in Limine* had the effect of rendering a decision by November 8, 1989 impractical. The Commission noted that "[i]t is . . . apparent that the briefing of these issues and their resolution and subsequent final action on Maine Yankee's proposed decommissioning financing plan will require an extension of the 180-day statutory deadline." The Commission in its order decided that the 180-day decision deadline was directory rather than mandatory and therefore subject to extension. All parties also agreed that the deadline could be extended beyond the 180 days described in the statute. The Commission accordingly found that it was in the public interest to extend the deadline to allow a full exploration of the legal issues raised by the parties as well as to allow adequate time for evidentiary hearings. The deadline for final Commission action was extended 30 days to December 8, 1989. The deadline was again extended, by agreement of the parties, to January 29, 1990.

On November 3, 1989, the Examiner issued a Procedural Order responding in part to Maine Yankee's Motion for Clarification and Motion for Prehearing Conference dated October 25, 1989. In that Procedural Order the Examiner ruled, *inter alia*, that hearings on the substantive issues concerning Maine Yankee's decommissioning financing plan would proceed as scheduled even though not all legal questions concerning preemption and

estoppel had been decided. Staff was therefore not prohibited from presenting testimony concerning alternative funding and timing scenarios.

On November 7, 1989, Maine Yankee prefiled the testimony of Mr. Patrick S. Lydon, Vice President of Finance and Administration and Chief Financial Officer of Maine Yankee. Staff, also on November 7, prefiled the testimony of Dr. Thomas D. Austin, Director of Finance, Maine Public Utilities Commission. Hearings began on November 17, 1989, at which Mr. Lydon and Dr. Austin were cross-examined. On November 28, 1989, Maine Yankee prefiled the rebuttal testimony of James F. Callahan and Ronald D. Jones. Staff, on November 30, 1989, prefiled the surrebuttal testimony of Dr. Austin. Further evidentiary hearings were held on December 4, 1989 at which Dr. Austin and Mr. Callahan testified. Staff filed, on November 30, 1989, a Motion to Strike the Testimony of Ronald D. Jones on relevancy and other grounds. This Motion was granted by Procedural Order dated December 4, 1989.

On November 29, 1989, a comprehensive stipulation of the issues in this proceeding was filed by the IECG, the Public Advocate and Maine Yankee. Staff filed a memorandum in opposition to the Stipulation on December 1, 1989. A hearing on the Stipulation was held on December 15, 1989.

Briefs were filed by Maine Yankee, Staff and the Public Advocate on December 18, 1989 and Reply Briefs were filed on December 26, 1989.

II. BURDEN OF PROOF

The NDFA requires any licensee operating a nuclear power plant within Maine to file a proposed decommissioning financing plan with the Public Utilities Commission and for the Commission to review that plan and ultimately approve a decommissioning financing plan. 35-A M.R.S.A. § 4353(2) and (3). In reviewing a plan, the Commission must find that the plan provides reasonable assurance that, among other things, contributions to the decommissioning fund are equitably spread over the useful life of the plant to the extent feasible and that the plans and options for insuring against or otherwise financing any shortfall in the fund resulting from a premature closing are adequate and reasonable. 35-A M.R.S.A. § 4353(3)(b)(6) and (7). Finally, if the Commission finds that any plan submitted by a licensee does not provide reasonable assurance that the criteria mentioned in the statute are satisfied, then the Commission must reject the plan and order that the plan be modified as the Commission determines necessary to meet those criteria. 35-A M.R.S.A. § 4353(3)(c).

The Act goes on to require the Commission to establish the cost of decommissioning of any nuclear power plant located in the state and to establish a schedule of monthly payments into the decommissioning trust fund established for that plant as necessary and convenient to meet that cost of decommissioning at the time of closing. The Legislature required, for purposes of cost estimates, that the method of prompt removal and dismantlement be used as the method of decommissioning, unless the United States Nuclear Regulatory Commission or its successor requires another method. 35-A M.R.S.A. § 4353(4).

Because decommissioning may not occur for a long time, the Commission must periodically review the estimated costs of decommissioning at least every five years and, based upon that review, revise the schedule of monthly payments as necessary. 35-A M.R.S.A. § 4353(6).

This statutory scheme unequivocally places the burden of proof on the utility to demonstrate that each element of its decommissioning plan is reasonable. If we determine that the utility has failed to prove that a portion of its plan is reasonable, we must modify the plan in a manner that results in a reasonable plan in all respects.

III. PREEMPTION

A central issue in this case has been whether the Commission is preempted from entering an order inconsistent with the terms of the recent settlement agreement approved by FERC concerning Maine Yankee's wholesale rates and, in particular, the decommissioning costs reflected in those rates. See Maine Yankee Exhibit 2, at 126. Maine Yankee argues that we would be preempted upon entering such an order by operation of the Supremacy Clause to the United States Constitution. Maine Yankee therefore urges us to decline to enter an order that would require Maine Yankee to pay into the decommissioning trust fund an amount different from what Maine Yankee is currently collecting in its wholesale rates and paying into the fund pursuant to the FERC-approved settlement agreement.

A. Maine Yankee's Position

Maine Yankee in its brief argues that we are preempted by the FERC's activities in the area of decommissioning costs under two distinct preemption theories. First, Maine Yankee argues that a pervasive scheme of federal regulation exists that, when viewed in its totality, "combine[s] to pervasively control the field of nuclear decommissioning . . . ." Maine Yankee Brief at 30. Second, Maine Yankee argues that the NDFA and any order we might issue that is inconsistent with FERC's decision concerning decommissioning costs in FERC docket ER88-202 directly conflicts with provisions of the Federal Power Act.

Maine Yankee notes, correctly, that federal law influences how utilities deal with the subject of decommissioning costs through the operation of three regulatory schemes: the regulations of the Nuclear Regulatory Commission (NRC) (10 C.F.R. Parts 30, 40, 50, 51, 70 and 72 (1989)), provisions of the Federal Power Act (FPA) (16 U.S.C.A. § 824 et. seq.) and a provision of the Internal Revenue Code (IRC) dealing with the deductibility of nuclear decommissioning costs, I.R.C. section 468A. Pursuant to an established line of U.S. Supreme Court decisions, congressional intent to occupy an area of law "may be inferred where the pervasiveness of the federal regulation precludes supplementation by the states, where the federal interest in the field is sufficiently dominant, or where 'the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose.' " Maine Yankee Brief at 30, quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. ___, 108 S.Ct. 1145, 1150 (1988).

Maine Yankee analyzes the NRC regulations concerning decommissioning promulgated in 1988 and concludes based on that analysis that the NRC has, in effect, delegated to FERC the authority to actually set a decommissioning cost, at least for wholesale utilities. Maine Yankee notes that the NRC explicitly regulates decommissioning alternatives, decommissioning planning, assurance of availability of funds for decommissioning and environmental review. *See* 53 Fed. Reg. 24018-19. The NRC also sets minimum amounts (expressed in January 1986 dollars) required to demonstrate reasonable assurance of funds for decommissioning by reactor type and power level. 10 C.F.R. part 50.75. The NRC rules state, however, that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) having jurisdiction over rate regulation. The requirements of this section, in particular paragraph (c) [setting minimum amounts] are in addition to, and not substitution for, other requirements, and are not intended to be used, by themselves, by other agencies to establish rates." 10 C.F.R. part 50.75(a).

Maine Yankee apparently concludes, based on these sections of the NRC regulations, that while the NRC does not and would not in and of itself preempt a state from setting a decommissioning cost for a wholesale utility, the NRC regulations appear to contemplate that regulatory bodies with rate setting authority would exercise primary jurisdiction over decommissioning costs. Maine Yankee, of course, concludes that because FERC is its rate regulator, only FERC may set its decommissioning cost.

The second leg of Maine Yankee's argument concerning a "pervasive scheme" is that because under the Federal Power Act FERC is granted exclusive jurisdiction over the fixing of wholesale power rates, the Maine Commission is without authority to enter an order that would conflict, or have the tendency to interfere with, a FERC established rate. Maine Yankee argues that entering such an order would lead to a direct conflict because such an order would either be the functional equivalent of setting a rate or would impermissibly interfere with that rate.

Maine Yankee argues specifically that FERC has extended its exclusive jurisdiction over ratemaking to the establishment of, and regulation of collections for, decommissioning trust funds. Maine Yankee asserts that FERC's authority to set decommissioning costs stems from its overall authority to establish a cost of service prior to actually setting rates to reflect that cost of service. Maine Yankee relies on the rate setting provisions of the Federal Power Act, 16 U.S.C.A. section 824 et seq., particularly section 824e, to support its position. Maine Yankee also cites several FERC decisions in which FERC took upon itself the responsibility to review and approve decommissioning financing plans. *See, e.g.*, Systems Energy Resources, Inc., 37 FERC § 61,261 (1986) ("SERI"). In the SERI case FERC reviewed a utility's external decommissioning trust fund. FERC rejected the company's proposed trust fund and ordered that it file one that complied with FERC-established guidelines. FERC also asserted authority over the timing and amount of the utility's contributions to the fund. We note that FERC did not in the case discuss the question of what it would have

done had it been presented with a state-approved decommissioning cost plan.

In addition to FERC cases in which FERC has dealt extensively with the decommissioning issue, Maine Yankee contends that FERC has exercised its jurisdiction over Maine Yankee's decommissioning fund on several different occasions over the past nine years. Because FERC has exercised its jurisdiction over Maine Yankee's decommissioning fund in the past, Maine Yankee argues that we are now precluded from setting a decommissioning cost that in any manner conflicts or interferes with the FERC-approved rate. We take administrative notice that FERC has in the past acted with respect to Maine Yankee's decommissioning fund. *See, e.g.*, 17 FERC § 61,208 (1981); 20 FERC § 61,141 (1982); 44 FERC § 61,368 (1988). We also note, however, that a review of these orders reveals that FERC has never ruled definitively one way or another about whether it has effectively preempted all state activity in this area.

The third and final leg of Maine Yankee's "pervasive scheme" argument concerns the federal tax laws on decommissioning funding. In order to qualify for a deduction from income for federal tax purposes, utilities must comply with the provisions of section 468A of the IRC and regulations promulgated thereunder. Some of the requirements imposed by the statutory and regulatory scheme include a level funding of decommissioning reserves, that the utility obtain a schedule of ruling amount from the IRS and that the amount allowed in the schedule of ruling amount by the IRS be included in the utility's cost of service for ratemaking purposes by the regulatory body responsible for setting the utility's rates.

Maine Yankee notes that in the SERI case, FERC required the utility to develop a decommissioning plan consistent with the requirements of section 468A and also to seek to minimize the payment of taxes on contributions to the trust fund. Maine Yankee also notes that it has obtained a schedule of ruling amount from the IRS in the amount of $167,000,000 and that in a Private Letter Ruling issued January 23, 1989 the IRS stated that "[p]ayments made to the fund can qualify only to the extent that they do not exceed the decommissioning costs included in the taxpayer's cost of service for ratemaking purposes in the taxable year." Maine Yankee Exhibit 2, at 333. Based on this interrelationship between FERC policy as expressed in several of its decisions and section 468A of the IRC, Maine Yankee argues that they are "inextricably interwoven" so as to give force to its contention that a pervasive scheme of federal regulation preempts state action in this case.

In addition to its argument that a pervasive scheme of federal regulation exists which preempts inconsistent state action in this case, Maine Yankee also argues that any state action that results in a decommissioning cost inconsistent with that allowed in rates by FERC constitutes a direct conflict with the FERC rate order in Docket ER88-202 and provisions of the Federal Power Act. While this is essentially a restatement of the second leg of the "pervasive scheme" argument described above, Maine Yankee advances several additional theories which merit comment.

Maine Yankee notes, correctly, that state action will be preempted, even in the absence of a pervasive scheme, when state law actually conflicts with federal law. The

Supreme Court has unequivocally stated that a conflict will be found "when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1150-51.

Maine Yankee argues that by ordering it to pay into the decommissioning trust fund an amount greater than FERC has allowed in its rates we would be directly interfering with FERC's ratemaking authority. This would be so, argues Maine Yankee, even though the setting of decommissioning costs in this docket is not ratemaking per se, but rather is establishing a cost of service that would perhaps be incorporated into a rate at some future point in time. Maine Yankee cites numerous Supreme Court and federal circuit court decisions which establish the principle that a state law, and presumably state action, need not deal specifically with rates in order to be preempted by FERC's plenary jurisdiction over wholesale ratemaking. *See, e.g., Northern Natural Gas Co.*, 372 U.S. 84 (1963); *Commonwealth of Massachusetts D.P.U. v. FERC*, 729 F.2d 886 (1st Cir. 1984).

Maine Yankee argues that any order of this Commission which requires Maine Yankee to pay an amount into the decommissioning trust fund in excess of that allowed by FERC in its rates would interfere with three components of Maine Yankee's rates: the decommissioning cost allowance, the company's overall rate of return and the company's depreciation allowance. Maine Yankee argues that by raising the decommissioning amount we could possibly alter Maine Yankee's rate of return.

Finally, Maine Yankee contends that we would be promoting a ratemaking treatment which is inconsistent with a FERC-approved rate by ordering Maine Yankee to pay more into the decommissioning fund than it already is paying. In *Commonwealth of Massachusetts D.P.U. v. FERC*, the Massachusetts D.P.U. objected to a rate-setting practice of a utility company as embodied in a FERC-approved private utility agreement and ordered the company to seek FERC approval for a change of the practice. The First Circuit held that if the state D.P.U. wanted the practice changed it could petition FERC itself. It could not order the utility to seek the change. Maine Yankee argues that by ordering Maine Yankee to pay an amount into the decommissioning trust fund in excess of what it is currently allowed in its FERC-approved rate, we would be impermissibly interfering with that rate.

B. Staff's Position

Staff argues initially in its brief that as a matter of policy, we should not declare ourselves preempted by federal law if a rational argument can be made that we are not preempted. Staff believes that once a rational basis has been established that our actions and the statute under which we act are constitutional we should act as directed by the Legislature and leave it to the courts to tell us that we are wrong. While we believe that we have the authority and jurisdiction to declare ourselves preempted, we agree with Staff that we should decline to do so in this case for reasons set forth more fully below.

Staff's argument is relatively simple and straightforward. Staff contends that the NDFA is a valid exercise of

the state's police power that does not impermissibly intrude upon or conflict with federal statutes and regulations governing wholesale ratemaking and the regulation of nuclear power generally. Staff argues that our regulation over the costs of decommissioning is valid economic regulation over nuclear power that is similar to that sanctioned by the U.S. Supreme Court in *Pacific Gas and Electric v. Energy Resources Commission*, 461 U.S. 190 (1983). In that case, the U.S. Supreme Court interpreted the Atomic Energy Act as being limited in its scope to regulation of the radiological safety aspects of the construction and operation of nuclear power plants and leaving to the states "their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. at 205. At least for purposes of interpreting the Atomic Energy Act, under which the NRC operates, the Court stated that "the legal reality remains that Congress has left sufficient authority in the States to allow the development of nuclear power to be slowed or even stopped for economic reasons." Id. at 223.

Staff also takes issue with Maine Yankee's interpretation of the NRC regulations governing decommissioning. As described above, Maine Yankee reads 10 C.F.R. part 50.75 as conferring in some way upon Maine Yankee's ratemaking body, the FERC, sole authority over decommissioning costs. Staff, interpreting the same section, draws the opposite conclusion. Staff argues that because the NRC has set only minimum guidelines with respect to decommissioning costs, and because the NRC has left it to the state commissions and FERC to determine the

adequacy of site-specific plans, the NRC has not preempted the states with respect to decommissioning. Staff notes, accurately, that utilities with nuclear power plants having retail sales typically have their decommissioning costs set by their respective state regulatory commissions. Staff's arguments concerning the scope of the NRC regulations appear to be designed to weaken the first "leg" of Maine Yankee's "pervasive scheme" argument outlined above.

A key aspect of the Staff's position is its assertion that the setting of decommissioning costs is not ratemaking and hence not preempted by FERC even though the costs of implementing such a plan are reflected in rates. Staff argues that "FERC has no authority to relieve the utility of the obligation imposed by state law any more than it has authority to veto a State's tax structure or workmen's compensation law to suit its own notions of what is fair." Staff Brief in Response to Maine Yankee's Motion in Limine at 15.

Staff goes on to analyze provisions of the Federal Power Act to demonstrate that FERC does not have exclusive jurisdiction over setting the cost of service. Staff believes, based on its reading of section 824e of the Federal Power Act, that while FERC can and should factor the cost of decommissioning into the wholesale rates it establishes, it lacks exclusive control over those costs in cases where a state commission has set those costs pursuant to state law. Staff argues that the only limit upon the state's power to set decommissioning costs are the minimum NRC guidelines which affect the decommissioning costs of both wholesale and retail nuclear power plants. Staff's arguments concerning the nature of

the establishment of decommissioning costs strikes at the core of Maine Yankee's argument that provisions of the Federal Power Act and FERC's actions thereunder directly preempt state action in this area and, of course, would also cast doubt upon the second leg of Maine Yankee's "pervasive scheme" argument.

Staff also attacks the third "leg" of Maine Yankee's pervasive scheme argument concerning the effect of IRC section 468A and regulations promulgated thereunder. Staff argues that merely because FERC has in several of its decisions (e.g., the SERI case discussed above) directed utilities to follow the provisions of IRC § 468A in order to qualify for the tax benefits associated with such compliance, that in and of itself, does not result in "preemption" by the IRS. Staff points out that the existence of federal regulations determining the deductibility of decommissioning expenses in no way precludes a state from exercising its authority to impose decommissioning costs consistent with the basic NRC regulations.

In its Memorandum in Support of Motion in Limine dated November 30,1989, Staff makes several additional arguments to support its view that FERC has not directly preempted the states and that an insufficient basis exists to demonstrate a pervasive scheme. Staff cites a long line of Supreme Court decisions which stand for the general proposition that the federal courts will not void state statutory schemes absent a clear expression of preemptive intent from the Congress. *See, e.g., Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 429 (1966). Applying this general principle to the provisions of federal law at issue here, particularly provisions of the Federal Power Act, Staff concludes that Congress has manifested no

clear expression of preemptive intent with respect to the setting of decommissioning costs. Staff notes, correctly, that the Federal Power Act was originally passed to "fill the regulatory gap" left by the Supreme Court's decision in *Public Utilities Commission v. Attleboro Steam and Electric Co.*, 373 U.S. 83 (1927). In that case the Supreme Court held essentially that regulation of interstate and wholesale rates for electricity were beyond regulation by the states due to the operation of the Commerce Clause of the United States Constitution. Staff argues, therefore, that the extent of FERC's jurisdiction must be measured by the extent of the regulatory gap left by the Commerce Clause cases such as *Attleboro* and its progeny. The federal legislation passed to "fill the gap" should be given preemptive effect "only to the extent necessary to protect the achievement of the aims" of the federal statute. Staff Memorandum at 4, quoting *Merrill Lynch v. Ware*, 414 U.S. 117, 127 (1964). Staff applies these basic principles of the law of preemption to the issue of decommissioning costs and concludes that Congress has not acted to preempt state regulation of decommissioning costs even though the setting of decommissioning costs has an effect on how FERC will set wholesale rates. Staff argues that the effect is only "incidental" to the setting of rates and therefore permissible.

Staff also argues that the balance between federal and state jurisdiction under the Supremacy Clause must be informed by the nature of the activity which is the potential subject of preemption. Staff cites as an example *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) where the Supreme Court upheld a Florida statute

against a Supremacy Clause attack. In that case the Florida legislature enacted a statute that expanded the liability of oil tankers and their owners beyond that required by federal law. The Supreme Court, in upholding the statute, placed considerable emphasis on the nature of the activity that was the subject of both state and federal regulation, in that case the pollution of coastal waters. The Court found that the state had the right to exercise its police power in an area where it had a substantial and traditional interest in protecting its citizens.

Finally, Staff cites us to numerous recently enacted statutes in the environmental and nuclear waste area that give to the states an increased regulatory role. Staff cites these statutes as support for the view that decommissioning costs are not subject to a pervasive scheme of federal regulation. These statutes include the Clean Air Act, the Safe Drinking Water Act, the Hazardous Materials Transportation Act, the Uranium Mill Tailings Act, the Powerplant and Industrial Fuel Act, the Low-level Radioactive Waste Policy Act, and the Nuclear Waste Policy Act. Staff argues that given Congress' recent inclination to place more and more responsibility on the states to handle the wastes and byproducts of nuclear power plants, it is reasonable to assume that Congress would not and has not foreclosed the states from acting with respect to the financial planning for the disposal of those wastes.

C. Office of the Public Advocate's Position

The OPA supports Maine Yankee's position on the preemption question. The OPA offers its own legal

analysis of this question which is similar to that put forward by Maine Yankee. Several additional points raised by the OPA, however, merit further discussion.

The OPA is concerned that if we act in this case in a manner inconsistent with what FERC has already done, the Commission would be embroiling the parties in litigation for the next several years at considerable cost. The OPA believes this would be a waste of resources and would likely prove fruitless in any event. The OPA argues that if we decide we are not preempted and then are reversed on appeal, a bad and potentially dangerous precedent would be set with respect to other assertions of state regulatory authority in the nuclear power field. The OPA notes specifically that recently enacted state legislation concerning "below regulatory concern" low level radioactive waste, the existing state resident inspector program at Maine Yankee and Maine's Low Level Radioactive Waste Authority Act of 1987 would all be at risk of being overturned as preempted by federal law.

D. IECG's Position

The IECG supports Maine Yankee's position on the preemption question. The IECG, like the OPA, also raises concerns about the costs involved in litigating an appeal of a decision by this Commission finding no preemption. The IECG believes resources could be more wisely spent. The IECG is also concerned about the practical effect of a decision by this Commission that conflicts with what FERC has already approved in FERC's rates. The IECG is concerned that Maine ratepayers may end up paying more into the decommissioning fund than non-Maine

ratepayers should we adopt the Staff's position or a position similar to it.

E. Analysis

All the parties agree that it is through the operation of the Supremacy Clause of the United States Constitution that federal law preempts conflicting state law. The Law Court has described the doctrine of preemption in the following terms:

> A conflict warranting preemption may be direct in that the regulation obviously contradicts federal regulation, or it may arise from congressional intent, either express or implied, to occupy a particular area . . . Preemption, however, is not a favored concept, and federal regulation will be deemed to be preemptive of state regulatory powers only if grounded in "persuasive reasons – either the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably 'so ordained.' [citation omitted]

Director of Bureau of Labor Standards v. Fort Halifax Packing Company, 510 A.2d 1054,1057-58. Furthermore, "[p]reemption analysis always starts with the presumption that Congress did not intend to displace state law." *State of California v. Federal Energy Regulatory Commission*, 877 F.2d 743, ___ (9th Cir. 1989). We add to these general principles the point raised by Staff in its Brief concerning the proper role of the Commission in passing upon the constitutionality of statutes with which we are directed by the Legislature to implement. As noted above, while we believe we have the authority to declare ourselves preempted, we should do so only under the most obvious of

circumstances since our primary role is not that of legal advisor to the Legislature, but rather, as an administrative agency charged by the Legislature with the responsibility and duty to carry out and implement the laws as enacted by that body. With these basic principles guiding us, we conclude that we are not foreclosed from approving a cost of decommissioning that is greater than the amount that is currently reflected in its FERC-approved wholesale rates.

1. Pervasive Scheme

In *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. at 1150 the Supreme Court noted that "[i]n the absence of explicit statutory language . . . Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States . . . ." No party before us in this case argues that any federal statute explicitly grants to FERC or any other agency the exclusive authority to set decommissioning costs. We must therefore infer some intent from the overall existing scheme of regulation if we are to adopt Maine Yankee's position.

Maine Yankee points first to the NRC regulations governing decommissioning as an example of congressional intent to occupy the field. The NRC regulations, in particular 10 C.F.R. part 50.75, set minimum decommissioning standards and "are not intended to be used, by themselves, by other agencies to establish rates." *Id.* at part 50.75(a). The regulations, and comments accompanying the regulations, however, contain some discussion

about how the FERC and state regulatory bodies are to use the NRC guidelines. Part 50.75(a) states that "[f]unding for decommissioning of electric utilities is also subject to the regulation of agencies . . . having jurisdiction over rate regulation." In response to comments on the Rule, the NRC states in its order issuing the final rule that

> Under the existing statutory scheme the NRC has the authority to require specific funding arrangements in order to protect public health and safety whereas the other agencies do not. NRC's rule amendments permit a State or Federal rate regulatory agency to choose from among the funding alternatives listed in the final rule and to choose levels of funding based on specific considerations related to their ratemaking responsibilities. . . .

53 Fed. Reg. 24038 (June 27, 1988). Maine Yankee concludes, based on its reading of these sections of the NRC regulations, that the *NRC* has granted to FERC the exclusive authority to set decommissioning costs for utilities under its rate jurisdiction.

In the first place, it should be obvious that the NRC cannot grant jurisdiction to a co-equal federal agency. That is the function of Congress. Nor do we read the NRC regulations as purporting to assign authority between the states and another federal agency. Rather, the NRC was disclaiming whatever ratemaking powers it may have itself and was stating that decommissioning costs and rates to fund decommissioning were matters for the proper ratemaking regulatory authority, whether state or federal. The NRC regulations are silent with respect to the role state-approved decommissioning funds are to play in the case of utilities with wholesale rates regulated

by the FERC. It is obvious that the NRC does not view state commissions to be incompetent in this area since the NRC regulations specifically provide for the possibility that state commissions would be acting with respect to the setting of decommissioning costs and rates. We conclude that the NRC regulations could not, did not intend and do not preempt our authority to establish a decommissioning cost or to pass to FERC the sole and exclusive authority to set those costs.

Maine Yankee also argues that because FERC itself has acted to set decommissioning costs for Maine Yankee and other wholesale utilities, we are foreclosed from finding or setting decommissioning costs inconsistent with the FERC-approved rate. We agree with Maine Yankee that FERC has set wholesale rates for Maine Yankee as well as other wholesale utilities and, in doing so, necessarily has determined what level of decommissioning costs it will allow in rates. We agree further that FERC has the authority to so act pursuant to section 824e of the Federal Power Act. The fact that FERC has acted, however, does not answer the question of whether we may act to determine the proper level of decommissioning costs pursuant to state law. The SERI case cited by Maine Yankee surely applies to all utilities lacking the benefit of a state-mandated and approved plan. Nowhere in the SERI decision, however, does FERC state that the setting of decommissioning costs is an exclusively federal function. Indeed, an examination of past Maine Yankee decisions at FERC indicates that FERC recognizes the legitimate role state action might have in this area.

In docket ER82-15-000 (20 FERC 61,141) (August 3, 1982), FERC approved a settlement agreement that

included a specific amount in Maine Yankee's rates to cover decommissioning costs. In its discussion of Maine Yankee's position with respect to the level of funding, the FERC order approving the settlement agreement notes:

> In reference to concerns that the level of decommissioning charges is too low, the company claims that there is no basis for concluding that the Maine Act requires a level other than that proposed *pending final Maine PUC action* on Maine Yankee's "financing plan". The settlement rates are based on tentative estimates, subject to future adjustment, and Maine Yankee would file a subsequent application with the Commission *if a higher charge is imposed by Maine law.*

Order Approving Settlement at 5 (slip op.) (emphasis added). Nothing in subsequent settlement agreements involving Maine Yankee suggests that FERC has in any way changed this early view concerning the potential state regulatory role in decommissioning financing. We disagree, therefore, with the conclusion that because FERC sets all aspects of Maine Yankee's rates, we are precluded by operation of the NRC regulations from approving a decommissioning cost amount that may differ from what FERC has allowed in rates.

Finally, we disagree with Maine Yankee that the IRC statutes and regulations governing the deductibility of decommissioning add further evidence of the pervasiveness of federal regulation over decommissioning costs. We do agree that FERC does require utilities over which it exercises jurisdiction to follow the IRC provisions in order to minimize the utility's tax burden and that IRC section 468A permits deductibility only to the extent the

amount sought has been approved by the utility's rate setting body. This interplay between FERC and the IRS, however, does not lead to the conclusion that the IRC provisions preempt state law concerning the establishment of decommissioning costs. No individual or business in the United States escapes the pervasive purview of the IRC. If being subject to federal tax law were sufficient to allow federal preemption, there would be no state government at all. The IRC provisions obviously do have some bearing on the tax treatment of contributions to the fund. We agree with Staff, however, that the IRS has no authority or responsibility to delineate the relative responsibilities of state and federal agencies over decommissioning costs.

Our analysis of the three "legs" of Maine Yankee's "pervasive scheme" argument convinces us that a pervasive scheme of federal regulation over decommissioning costs does not exist that would preempt supplementation by a state regulatory body. We are simply unable to discern a clear preemptive intent on the part of Congress with respect to this issue. In addition our analysis of the three areas of federal law discussed above, we agree with Staff that "pervasiveness" must also be measured by the nature of the activity sought to be preempted and the extent to which the state's traditional police power would be eroded by the assertion of exclusive federal control. It goes almost without saying that the decommissioning of a nuclear plant involves substances which are among the most harmful to human health. Because Maine Yankee's nuclear power plant is located in Wiscasset, Maine, the

state has a compelling interest in seeing, to its satisfaction, that the company generating those wastes has the financial capacity to dispose of them.

2. Direct Conflict

The second prong of Maine Yankee's preemption argument is that our intrusion into the area of decommissioning costs would directly conflict with FERC's ratemaking authority pursuant to section 824e of the Federal Power Act. Maine Yankee argues specifically that FERC has exclusive jurisdiction over Maine Yankee's wholesale rates and, therefore, over the setting of Maine Yankee's cost of service, an essential element of ratemaking. Because of FERC's authority over the cost of service, Maine Yankee argues that by setting a cost of decommissioning pursuant to the NDFA we would be impermissibly interfering with FERC's rate setting responsibilities. The OPA also argues that setting a cost of decommissioning pursuant to the NDFA would be the functional equivalent of directly asserting ratemaking jurisdiction over Maine Yankee's wholesale rates. The OPA points to the fact that FERC has affirmatively set Maine Yankee's cost of decommissioning several times over the past decade in rate proceedings, thereby indicating substantial interest in this field. Our analysis of this issue leads us to the conclusion that there is no direct conflict.

All parties apparently agree that by setting a cost of decommissioning we would not be establishing a rate per se. Rather, we would be establishing a cost of service which FERC would have to consider in setting a wholesale rate for Maine Yankee. In order to determine whether we may engage in such an activity, we turn to the Federal

Power Act itself and related preemption cases for guidance.

Section 824(a) declares the policy governing the federal regulation of wholesale power rates. This section notes that federal jurisdiction extends to "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale." Federal jurisdiction, however, extends "only to those matters which are not subject to regulation by the States." The ratemaking provisions of the Federal Power Act therefore serve the purpose of "filling the regulatory gap" left by the *Attleboro* decision and its progeny.

Section 824e(a) sets forth the ratemaking jurisdiction of FERC. Pursuant to this section, FERC "shall determine the just and reasonable rate . . . and shall fix the same . . . ." We agree with Maine Yankee that this section empowers the FERC to determine the cost of service in order to set a just and reasonable rate. Nowhere in this section, however, is the authority to determine costs for every element of the overall cost of service described as the exclusive domain of FERC. As pointed out by Staff, this section does not even mention the word "cost." Rather, it is by implication that FERC must set costs.

In order to find no direct conflict we must examine and reconcile two Supreme Court decisions having a bearing on this matter, *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986) and *Schneidewind v. ANR Pipeline Co.*, 108 S.Ct. 1145 (1988).

In *Nantahala*, the Supreme Court reversed a decision of the North Carolina Supreme Court that because a utility (Nantahala) had purchased an unreasonably large

quantity of high-cost power from the TVA, the North Carolina Utilities Commission did not err in refusing to pass those costs on to retail customers. Nantahala sold at both retail and wholesale. Its wholesale rates had been approved pursuant to a FERC determination concerning allocations of certain low cost "entitlement power" and high cost "purchased power" that Nantahala received. This allocation had actually been litigated at FERC. The North Carolina Supreme Court determined that although the allocation of power had been approved by FERC that alone did not answer the question of whether the North Carolina Utilities Commission was precluded from determining whether the costs resulting from that allocation should be automatically passed through to retail consumers in the form of higher rates. The U.S. Supreme Court held that the state commission was precluded from disturbing the power allocation which it apparently viewed as integral to the wholesale ratemaking process, and was therefore required to pass whatever costs were incurred as a result of that allocation on to intrastate ratepayers. Thus, although the power allocation by FERC was not wholesale ratemaking per se, its effect on rates was sufficient to trigger application of the "filed rate doctrine" which holds that "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nantahala Power & Light v. Thornburg*, 476 U.S. at 962. The Court explicitly noted that the filed rate doctrine is not limited to rates per se, but rather, would be applicable in cases where rates were directly affected by the FERC action. *Id.* at 967.

In our view, *Nantahala* is not controlling because we are not here setting an intrastate rate in conflict with a FERC-approved rate or declining to pass through to retail customers a FERC determined interstate rate or cost of service. Rather, we are determining only what we perceive to be a reasonable cost of decommissioning pursuant to the NDFA. We are uncertain, as are all of the parties, whether FERC will include the amount we determine proper in Maine Yankee's wholesale rates. FERC has not yet spoken concerning this issue. While we concede that we cannot require FERC to include in Maine Yankee's rates the amount we set for decommissioning costs, the cost of decommissioning as established by this regulatory body is difficult to distinguish conceptually from the amount that Maine Yankee must pay in state income taxes or the rate at which Maine Yankee must pay the Department of Energy for the eventual disposal of spent nuclear fuel. These costs, of course, are routinely passed through by FERC when determining what Maine Yankee's cost of service is for federal ratemaking purposes. If FERC declines to include the amount of decommissioning costs that we have established pursuant to the NDFA, then Maine Yankee may have a claim against FERC for confiscatory ratesetting.

In *Schneidewind*, the Supreme Court went a step further than it did in *Nantahala* and found a state activity even more unrelated to the setting of rates than power allocation to impermissibly interfere with FERC's ratemaking authority. In that case, a Michigan state law directed the Michigan Public Service Commission to approve the issuance of long-term securities by transporters of natural gas in Michigan for use in Michigan. The

natural gas companies which brought the declaratory judgment action in federal district court were interstate pipelines under the rate jurisdiction of FERC and were regulated pursuant to the Natural Gas Act. The companies argued, successfully, that the Michigan Public Service Commission lacked jurisdiction over their security issuances and therefore the companies did not need to obtain the Commission's approval prior to issuing those securities. The Supreme Court held that the Michigan statute infringed in an area that is "occupied" by FERC acting pursuant to the Natural Gas Act. The Court also held that the operation of the Michigan statute gave rise to the possibility of "imminent collision" between the state statute and the Natural Gas Act.

The Supreme Court began its analysis of the preemption question by first noting that while FERC did not directly regulate the issuance of securities by means of a pre-approval process, it indirectly did so through the setting of rates, particularly the setting of a utility's capital structure. The Court also viewed FERC's authority to issue certificates of public convenience and necessity as a means of ensuring the proper financing of projects and therefore an indirect regulation over the issuance of securities. The Court also cited several other powers possessed by FERC that indirectly regulate the manner in which wholesale utilities issue securities. The Court was forthright, however, in noting that FERC was not expressly authorized to approve or disapprove the issuance of securities by natural gas companies. The question, as posited by the Court, was whether the state statute regulated an area exclusively within a federal domain. *Id.* at 1153. That domain, according to the Court, was the

domain FERC has over the regulation of rates pursuant to the Natural Gas Act. The central question before the Court, then, was whether the Michigan statute amounted to a regulation of wholesale rates. The Supreme Court concluded that it did and therefore affirmed the lower court's decision finding the statute to be preempted.

The Court analyzed the purposes to be served by the Michigan statute and concluded that the Natural Gas Act sought to serve the same purposes. This analysis was in response to Michigan's assertion that the state statute sought to protect Michigan ratepayers as well as investors against the "evils" of overcapitalization, *Id.* at 1154, and therefore, at least with respect to ratepayers, higher rates. The Court was thus unable to discern any distinct purpose to be served by the Michigan statute independent of the Natural Gas Act.

The Court noted that "every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted." *Id.* at 1155. However, the Court was emphatic in stating that the Michigan statute was "a state law whose central purpose is to regulate matters that Congress intended FERC to regulate." *Id.* The Court concluded that "while the NGA does not expressly grant FERC pre-issuance authority over the securities of natural gas companies, FERC achieves the regulatory ends of such review with regard to rates and facilities through the exercise of its express regulatory responsibilities." *Id.* at 1155-56.

The Court further bolstered its conclusion by stating, in dictum, that the state statute was preempted because, if implemented, an "imminent possibility of collision"

would exist between the state statute and the Natural Gas Act. This collision would arise, according to the Court, if the Michigan Public Service Commission ever declined to approve an issuance of securities for a project which had been approved by FERC. Collision would also arise because "any state-ordered alteration in a company's capital structure would impinge on the federal ratemaking authority." *Id.* at 1156. The Court acknowledged that while not any hypothetical collision would give rise to preemption, the "imminent possibility" in this case "further demonstrated the NGA's complete occupation of the field. . . . " *Id.*

We provide this detailed analysis of the *Schneidewind* case because we believe we must reconcile that case with the decommissioning cost situation we are presented with here. In *Schneidewind*, FERC had no explicit authority over the issuance of securities; rather authority was inferred through FERC's jurisdiction over the ratemaking process. In the case now before us, while no provision of the Federal Power Act explicitly deals with decommissioning, FERC has acted in the absence of state regulation in determining a cost of decommissioning as part of the overall cost of service that is allowed in Maine Yankee's wholesale rates. Yet in so acting, at least in 1982, FERC seemed to have left open the distinct possibility of future state action in this area.

A key aspect of the *Schneidewind* decision was the emphasis placed upon the identity of interests served by the scheme of federal regulation and the state statute. Maine Yankee, of course, argues similarly that the FERC action in this area and the implementation of the NDFA serve identical interests. We do not believe so. While

FERC has set guidelines for decommissioning in several of its decisions and has set decommissioning costs for Maine Yankee, the NDFA does not have the same goals as the ratemaking authority of FERC. Section 4351 of the NDFA sets forth a litany of findings made by the state Legislature stating the peculiarly local concerns driving the requirements imposed by the NDFA. For example, section 4351(6) states that "[t]he Legislature finds that assurance is needed that funds will be available for the cost of decommissioning which would occur if a nuclear power plant is prematurely closed." This section of the statute was obviously driven by the Legislature's knowledge of the local history concerning the public's concern over whether Maine Yankee should remain open as reflected in three referendum campaigns over the past decade.

The ultimate mission of FERC, acting pursuant to its ratemaking authority, is to set just and reasonable rates for wholesale customers. While decommissioning costs are part of those rates, they are not the driving factor and the Federal Power Act sets forth no similar findings and no similar integral scheme of handling decommissioning costs. Thus, while both FERC and the Maine Commission are statutorily authorized to set decommissioning costs and those costs are designed to pay for the same physical process in the year 2008, the thrust of the two statutory schemes is different. We therefore distinguish the situation described by the Supreme Court in *Schneidewind* where the objectives of the securities issuance statute and the Natural Gas Act were held to be identical; that is, the assurance of reasonable rates and protection of investors.

The Supreme Court in *Schneidewind* also stated that the effect of the state statute in question "directly" impinged on FERC's ratemaking authority. The Court noted that an "indirect" effect might be permissible. In our view, the NDFA and orders we may issue thereunder will have only an indirect effect on Maine Yankee's rates because FERC may or may not decide to reflect the decommissioning costs we set here in Maine Yankee's rates. It is probably entirely up to FERC whether to reflect the costs we set here in Maine Yankee's rates.

Finally, we see no "imminent possibility of collision" between our action under the NDFA and FERC's rate setting authority. As noted above, FERC is not required by either state or federal law from reflecting the amounts for decommissioning we set here in Maine Yankee's wholesale rates. We believe that as a matter of federal-state comity, however, FERC will reflect our determination in Maine Yankee's rates.

Our analysis of the *Nantahala* and *Schneidewind* cases leaves us with the conclusion that we are not preempted as a matter of law from issuing an order pursuant to the NDFA that may conflict with what is currently allowed by FERC in Maine Yankee's wholesale rates because we can find no "direct conflict" by such an action. We are reinforced in this view by FERC's previous actions with respect to Maine Yankee, particularly the language found in the 1982 FERC decision approving settlement agreement, where FERC acknowledged the potential role to be played in the future by the then unimplemented NDFA. Thus, even though FERC has previously set the cost of decommissioning and reflected those costs in rates, a valid state law is now to be implemented in an area

where FERC, pursuant to its authority under the Federal Power Act, has not implicitly or explicitly preempted the field.

Although we do not believe that we are preempted from issuing an order pursuant to the NDFA that calls for an amount to be paid into the decommissioning trust fund in excess of what is now reflected in Maine Yankee's wholesale rates, we do not believe that FERC would be required as a matter of state or federal law by our order to reflect our determination in those rates.[1] As with every actual cost a utility experiences that cost may or may not be included by the ratesetting authority in its own determination of that utility's cost of service for rate purposes.

IV. COLLATERAL ESTOPPEL; JUDICIAL ESTOPPEL

Maine Yankee has separately raised the claim that the Maine Public Utilities Commission is barred by principles of collateral estoppel from deciding this matter any differently than the FERC did, on the grounds that the matter was actually litigated before FERC and the Maine Commission participated as a party.

We do not believe that the claim of collateral estoppel presents a ground for barring action by this Commission that is independent of the parallel claim that the Commission is preempted because of federal regulation in this area. In one alternative (preemption), it is obvious that it

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[1] Nor do we believe that we have the authority to require Maine Yankee to petition FERC for an increase in its rates to reflect the increased costs we impose here. *See Commonwealth of Massachusetts D.P.U. v. FERC*, 729 F.2d 886 (1st Cir. 1984).

is simply not necessary to consider the claim of collateral estoppel. If the State of Maine and this Commission are in fact precluded from reaching a decision contrary to that of the FERC because of federal preemption, then it is not necessary even to reach the issue of collateral estoppel. In the other alternative (no preemption), the conclusion may not be as obvious but we nevertheless believe it to be correct. If the State of Maine and this Commission are not preempted from deciding these issues differently than the FERC because of federal preemption, principles of res judicata or collateral estoppel do not act independently to bar a contrary decision by this Commission. In short, we do not believe that the claim of collateral estoppel has any viability in this proceeding independent of the claim of federal preemption.

If the FERC might defer to a state decision concerning the appropriateness of a decommissioning plan, it does not seem logical that the state decision should be barred merely because the amount necessary for decommissioning and the timing of its collection were previously litigated before the FERC. The inapplicability of res judicata principles under these circumstances arises not because the FERC lacked jurisdiction in the prior proceedings.[2] Plainly, as part of its ratemaking powers, the FERC had jurisdiction over all cost of service issues, including decommissioning costs and the timing of the

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[2] Of course, even if the FERC lacked jurisdiction over these issues, res judicata principles may still apply. In some jurisdictions, including Maine, lack of subject matter jurisdiction, in the absence of a timely objection, will not prevent the application of res judicata principles. *See Standish Tel. Co. v. Saco River Tel. and Tel. Co.*, 555 A.2d 478 (Me. 1989).

collection of decommissioning revenues. The inapplicability of res judicata principles instead would arise from the fact that the State of Maine has some independent jurisdiction over the matter of decommissioning costs and timing.

We also question whether the FERC decision on this matter was ever intended to have general collateral estoppel effect. Cost of service issues are generally relitigable in subsequent rate cases in the light of changed circumstances and more recent knowledge. There is no reason to believe that decommissioning costs and timing of collection are issues that should be treated differently in this respect from other cost of service issues. If cost of service issues are not precluded from relitigation before FERC, and assuming both Maine PUC jurisdiction over decommissioning and no federal preemption, there would appear to be no good reason why the decommissioning issues could not be relitigated before this Commission or before any other entity with jurisdiction over the subject matter. *Cf.* Restatement of Judgments 2d § 28(5)(a) (need for new determination of issue because of public interest).

Maine Yankee also separately raises the claim of "judicial estoppel" in support of its position that the Maine PUC cannot decide this matter. As characterized by Maine Yankee, judicial estoppel "operates to prevent the Maine PUC from deciding this matter in a manner contrary to the position it took as a party before the FERC." Maine Yankee states as the "general rule" of judicial estoppel

> that one party may not, to the prejudice of another party, deny any position taken in a prior

> judicial proceeding between the same parties or their privies, involving the same subject matter if successfully maintained in the earlier proceeding.

This doctrine differs from res judicata, therefore, in that it is the party's action and position before the prior tribunal that allegedly gives rise to the estoppel rather than the decision of the tribunal itself.

The "position" to which Maine Yankee refers is the fact that in 1981, in response to a letter from Maine Yankee to FERC stating Maine Yankee's "intent to collect decommissioning costs pursuant to its formula rate," this Commission filed a notice of intervention with the FERC and "took the position that Maine Yankee should be directed to resubmit its October 7, 1981, letter in the form of a rate schedule." Maine Yankee Prehearing Memorandum at 38. According to that memorandum, the FERC agreed and ordered Maine Yankee to file a rate filing.[3] (It is not clear from the memorandum that Maine Yankee disagreed.)

In the first place, Maine Yankee loses sight of the fact that the Maine PUC is not now a "party" to the present proceeding.[4] In this proceeding the Commission is acting in its adjudicative capacity in a matter that it is required to adjudicate by the Legislature of the State of Maine. It

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[3] For purposes of this decision we will accept these allegations as correct.

[4] Nor did the Maine Public Utilities Commission advocacy staff, which is a party to this proceeding (5 M.R.S.A. § 9054(5)), participate as a party before the FERC. Rather, Maine PUC staff attorneys represented this Commission itself as a party in the FERC proceedings.

may be barred from this adjudication by principles of federal preemption. Absent such preemption, however, we see no reason why this Commission should not adjudicate this matter simply because of a position that we took more than eight years ago in a different capacity as a party before the FERC. In other words, we come to the same conclusion that we do concerning collateral estoppel: the doctrine of judicial estoppel has no independent applicability that is separate from federal preemption itself. If we are preempted from making a decision in this area, there is no need to even consider the claim of judicial estoppel. If we are not preempted, a prior position taken as a party in a proceeding before a federal agency cannot act to negate the directive of the Maine Legislature to this Commission to decide this matter in our adjudicative capacity.

In any event, we see no inconsistency between the two positions. As discussed above, we are of the view that indeed the revenue requirement that is needed to satisfy decommissioning costs is properly a ratemaking issue before the FERC. As decided above in this order, the State of Maine and this Commission may well not be preempted from determining what those costs should be. If that conclusion is correct, either because the FERC must defer to state authority in this matter or because it is willing to do so, then it will presumably also determine that the costs established by this Commission are part of Maine Yankee's cost of service.

For the foregoing reasons, we rule against Maine Yankee's claims of collateral estoppel and judicial estoppel.

V. COMMERCE CLAUSE

Maine Yankee argues that any Order issued by this Commission that conflicts with what FERC has approved for decommissioning costs in Maine Yankee's wholesale rates would violate the Commerce Clause of the United States Constitution. Maine Yankee posits a scenario whereby we might order it to pay an amount into the decommissioning trust fund greater than what is currently reflected in Maine Yankee's rates. If FERC were to decline to incorporate this increased amount in wholesale rates, Maine Yankee contends that it might borrow the funds required to meet the extra costs. The interest on these loans would be substantial and would, according to Maine Yankee, reduce all of the owner's earnings. Maine Yankee then suggests that the Maine PUC would allow these interest costs to be passed through to retail customers of the Maine utilities that own Maine Yankee, but that other state commissions may not be so generous. Thus, argues Maine Yankee, the out-of-state owners would be put at an economic disadvantage relative to, for example, CMP. It is this potential disparity which gives rise to Maine Yankee's Commerce Clause argument.

Aside from our view that the scenario envisioned by Maine Yankee is somewhat remote, our disposition of the preemption question disposes of Maine Yankee's Commerce Clause concerns. First, if we are ultimately preempted from even approving a plan which includes an amount for decommissioning in excess of what has been approved by FERC in wholesale rates, the Commerce Clause issue becomes moot. Second, if we are not preempted from approving a plan and if FERC does ultimately reflect the amounts we set in this Order in Maine

Yankee's wholesale rates, Commerce Clause problems disappear. We therefore do not need to address the merits of Maine Yankee's Commerce Clause argument.

VI. DISCUSSION OF THE EVIDENCE

Title 35-A M.R.S.A. section 4353(2) requires a utility to submit a decommissioning financing plan that includes a number of discrete items, including "an estimate of the cost of decommissioning the plant expressed in dollars current in the year the plan is prepared and based upon an engineering report issued any time within 3 years of the date the plan is submitted to the commission." The bulk of the evidence presented in this case centered on whether Maine Yankee's proposed cost of decommissioning, $167,000,000, was reasonable. Maine Yankee, however, submitted numerous other documents as required by section 4353(2). Because of the great disparity in the amount of attention focussed on non-cost items in Maine Yankee's filing relative to the overall estimated cost of decommissioning, we shall consider the cost issues first and discuss all other items in a separate section of this Order.

A. Cost of Decommissioning and Timing of Recovery

Pursuant to 35-A M.R.S.A. section 4353(3)(B)(1) and (6) the Commission shall approve the decommissioning financing plan if the estimated time of closing the nuclear power plant and the estimated cost of decommissioning are reasonable and if contributions to the fund are equitably spread over the useful life of the plant to the extent

feasible. Both Maine Yankee and Staff presented testimony on these issues.

1. Maine Yankee

Maine Yankee presented the testimony of Mr. Patrick S. Lydon and Mr. James F. Callahan, Jr. Mr. Lydon's prefiled testimony outlines in some detail the history of Maine Yankee's decommissioning financing efforts before both FERC and this Commission. The primary value of Mr. Lydon's testimony concerning the history of Maine Yankee's decommissioning efforts is the escalating cost picture his testimony reveals. For example, in 1982 Maine Yankee was contributing $1,826,000 annually into the fund to cover a total estimated decommissioning cost of $57.6 million. In 1985 the annual contribution into the fund increased to $4,000,000 and in 1988 the annual contribution increased to approximately $9.1 million. See Lydon Prefiled at 6.

Mr. Lydon also discusses the site-specific study submitted by Maine Yankee in this case performed for Maine Yankee by TLG Engineering. *See generally* Maine Yankee Exhibit 2, at 11-119. That study estimates the cost to decommission the plant under three different decommissioning scenarios: 1) prompt removal and dismantlement ($178,097,900), 2) Entombment with delayed dismantling ($220,922,000) and 3) Mothballing with delayed dismantling ($235,618,000). All dollar estimates are expressed in mid-1987 dollars. Consistent with the NDFA, the Company has based its estimated cost of decommissioning on the prompt removal and dismantlement method. The Company's plan, however, although based on the TLG

estimate for prompt removal and dismantlement, calls for a total decommissioning cost of only $167,000,000 with an annual contribution of $9,073,943.

Mr. Lydon reconciles these two different figures ($178,097,900 vs. $167,000,000) in several ways. First, he believes the settlement amount ($167,000,000) is a reasonable estimate standing alone, apart from the fact that it is the amount approved by FERC. Mr. Lydon believes the TLG study to be a "conservative study biased toward the upper side of the cost estimates. . . . " Lydon Prefiled at 11. Furthermore, utilizing a FERC-approved 5% inflation factor, the $167,000,000 figure equates to $188.7 million as of year-end 1989. *Id.* at 12.

The Company in its brief also attempts to reconcile the actual TLG estimate with the amount submitted as part of the decommissioning financing plan. Maine Yankee notes that other estimates were proffered in the most recent FERC proceeding and that the TLG estimate was the highest. Maine Yankee also believes that the estimate approved by FERC should be given some deference by this Commission because FERC had the benefit of independent reviews of the TLG study by other intervenors. Based on these independent reviews and estimates, Maine Yankee argues that the FERC approved amount is "objective" and is the only fully developed and supportable number in the record. Finally, Maine Yankee believes $167,000,000 to be a reasonable figure because that number will be revisited several times during the next 20 years and estimates of decommissioning costs are likely to grow more accurate.

During the cross-examination of Mr. Lydon, it became clear that the only reason he believes the $167,000,000 number should be approved by this Commission is because FERC has approved that number. The following exchange is revealing:

> Mr. Buckley: And your testimony is that should be improved-approved because that's the number FERC says we can collect in rates, isn't that right?
>
> Mr. Lydon: That's correct.
>
> Mr. Buckley: So you're not providing an independent basis today that the number that FERC says is good is, in fact, a good number. You're just saying that's FERC's number, so we have to live with it. Isn't that right?
>
> Mr. Lydon: The-in our scheme of rate regulation, that's what we're pretty much obligated to file for, I believe.

Tran. C-57. Mr. Lydon did go on to say that he thought the number submitted by Maine Yankee in this proceeding was "very close" to the TLG estimate and was therefore reasonable.

Mr. Lydon, as well as his counsel, restated this view several times during his cross-examination. Responding to questions proffered by the Commission, Mr. Healy stated the position of Maine Yankee to be that "if they had their druthers" they would prefer to be collecting the full amount recommended by the TLG study for prompt removal and dismantlement. Tran. C-51, 52, 55, 75 (redirect).

Thus, while Maine Yankee argues in its brief that the FERC approved amount is an independently reasonable

figure upon which we may base a decision to approve the Company's plan, our review of the testimony offered by Maine Yankee leaves us with the distinct impression that its Chief Financial Officer believes $178,097,900 to be a preferable number. Maine Yankee, of course, in 1988 proposed to FERC that it collect $178,097,900 over a 10-year accelerated collection period. Its proposal at that time was based on the same TLG study submitted in this case. Mr. Lydon himself, as Maine Yankee's lead witness in that FERC proceeding, presented testimony in support of that $178,097,900 figure. *See* Staff Exhibit 2.

Maine Yankee's prefiled testimony at FERC was directed as much at convincing FERC to approve an accelerated collection period as it was at approving a total collection of $178,097,900. Maine Yankee sought at FERC to collect approximately $14.5 million annually for deposit into the decommissioning fund. Maine Yankee believed the accelerated collection was necessary for several reasons: 1) there was a substantial risk that the plant would be prevented from operating for its full licensed life due to a premature shutdown precipitated by local political events, 2) estimates tend to increase greater than general inflation, 3) although power contracts provide the collection of decommissioning costs after a shutdown "it is neither good public policy nor fair from a regulatory standpoint to rely on that fact as a substitute for prudent planning," and 4) because the plant was nearly 50% through its licensed life yet only 20-25% of the funds necessary for decommissioning were currently in the fund. Tran. C-45-49, 56-59. Mr. Lydon testified that in his view the local political climate concerning nuclear power had not changed since he prefiled his testimony at FERC,

Tran. C-56, and we infer from the tenor of the rest of his testimony on this subject that he believes the other factors noted above have not changed appreciably in the two years since the FERC proceeding concluded.

While Staff's cross-examination of Mr. Lydon focused on why the $167,000,000 figure collected over 20 years was too low, the Public Advocate's cross-examination of Mr. Lydon brought out to some degree that decommissioning costs may in fact be decreasing or leveling off for a variety of reasons. For example, in response to Mr. Ward's questions concerning the evolution of low level nuclear waste facilities, Mr. Lydon indicated that the number of such facilities was likely to grow in the near future and costs were likely to become more certain. Tran. C-62. The implication of this line of questioning appears to be that as the number of facilities grow, the cost of disposal may drop. *See also* Tran. D-35-36 (Austin). Mr. Lydon also agreed with Mr. Ward's suggestion that costs may decline because 1) below regulatory concern waste may in the future not have to be disposed of in a federally licensed facility, 2) technologies may improve and 3) federal surcharges on low-level waste may not apply in the future if Maine is in full compliance with federal requirements for disposal of low-level nuclear waste.

Mr. James F. Callahan, Jr. submitted prefiled testimony concerning the accounting, financial and tax effects of our ordering Maine Yankee to pay amounts into the decommissioning trust fund in excess of amounts now required to be deposited by FERC. Mr. Callahan's testimony assumes a scenario whereby we order Maine Yankee to pay $14.5 million annually into the fund but that that amount is not fully reflected in Maine Yankee's rates.

Rather, Mr. Callahan assumes that FERC would allow only the $9.1 million annual contribution in rates, leaving a shortfall of approximately $5,000,000. Although Dr. Austin, in his prefiled surrebuttal testimony, disputes the assumption that such a shortfall would actually occur, he does not take issue with the substance of Mr. Callahan's testimony. Dr. Austin's specific disagreements with Mr. Callahan are discussed below.

Mr. Callahan notes that the Company's customers contribute their respective shares of the Annual Decommissioning Amount directly into the trust fund. A portion of the amount contributed goes into a "Qualified Trust Fund" and a portion goes into a separate "Nonqualified Trust Fund." The portion which goes into the Qualified account is deductible by the Company for federal income tax purposes pursuant to a ruling from the Internal Revenue Service. The portion which the IRS recognizes as "Qualified" is that amount which FERC allows in rates. Thus, one consequence of our ordering Maine Yankee to pay an amount greater into the fund than is currently reflected in its FERC rates would be that the difference would not be tax deductible until such time as the amount was reflected in the Company's FERC rates. See Callahan Prefiled at 4-5.

Mr. Callahan provides as exhibits to his prefiled testimony calculations that attempt to show the adverse financial impact on the Company that a failure to recover the excess $5,000,000 would cause. Mr. Callahan calculates the costs that would be borne by shareholders as well as ratepayers if the Company were forced to borrow the funds necessary to fund the "excess contributions" or

if the Company funded the excess contributions internally. See Callahan Prefiled at 7-12, Exhibits JFC-1 through JFC-5.

In his critique of Mr. Callahan's testimony, Dr. Austin notes that if Mr. Callahan's borrowing analysis were to occur, the Company would have borrowed almost $100,000,000 by the year 2008. Dr. Austin emphasizes what Mr. Callahan states in passing: that it would be virtually impossible for Maine Yankee to borrow the funds since Maine Yankee's sole asset, the plant, would become a liability by the year 2008 and its only financial asset, the decommissioning trust fund would be pledged to decommissioning. Thus, unless the sponsors somehow guaranteed the loans, the borrowings would have to be essentially unsecured, a very unlikely scenario. Dr. Austin agrees with Mr. Callahan that it would be much more desirable from a financial point of view if the amount ordered into the fund by this Commission were fully reflected in the Company's FERC approved rates.

2. Commission Staff

The Commission Staff presented the testimony of Dr. Thomas Austin. Dr. Austin pointed out that, "the only current evidence Maine Yankee provides on decommissioning costs indicates a somewhat higher cost, [than the $167 million the Company proposed] some $178 million." *See* Austin Prefiled at 3. He is, of course, referring to the TLG engineering study. Dr. Austin continues, "I have no reason to believe that Mr. LaGuardia's estimate is anything other than the most reasonable point estimate which could have been made in 1987." *Id.* at 4. The thrust

of Dr. Austin's prefiled testimony from that point on is aimed at demonstrating why it is advisable for the Commission to adopt a decommissioning financing plan which results in an annual collection amount in excess of that implied by Mr. LaGuardia's estimate.

His first argument is based on an historical analysis of the real increases in previous cost estimates. *Id.* at 3-7. Since these previous estimates (a 1980 Stone & Webster study and a 1983 LaGuardia study) have been significantly revised upward by Mr. LaGuardia's most recent study, it would be wise to expect similar upward revisions in the future. Dr. Austin offered two possible scenarios to demonstrate how this could happen. First, increasing public concern over any nuclear related activity has in the past caused related cost increases in efforts to allay public fears. This may continue with regard to decommissioning activities. *Id.* at 5-6. Second, radioactive waste disposal costs may continue to escalate due to siting difficulties resulting in higher direct costs or delays in decommissioning resulting in inflation caused cost increases. *Id.* at 6-7.

Dr. Austin then describes another scenario which would make increased annual collections desirable. This is the possibility of a premature shutdown of the facility. *Id.* at 7-9. At that point the single asset corporation would no longer own an asset capable of producing earnings. The costs of decommissioning would then come from whatever amounts had been collected in the fund, any possible applicable insurahce payments and, if still short, from the contractual commitments of its customers. In short, Dr. Austin recommends that it is better to have as much of the funds available up front as possible.

Finally, Dr. Austin points to the requirements of the NDFA to the effect that payments to the fund be spread out in an equitable manner over the life of the plant. *Id.* at 10-11. Payments up to the present time amount to about 20% of the estimated cost although the plant has expended over 40% of its life. *Id.* at 9-11. It thus makes sense to increase payments now to catch up. Furthermore, if estimated costs increase in the future according to Dr. Austin's expectations, then those increases will have to be spread among fewer years of life resulting in increasing burdens on future ratepayers.

Dr. Austin's proposed solution is to assume a future cost of decommissioning of $225 million in 1987 dollars which results in an annual contribution to the fund of $13,965,287. *Id.* at 12.

3. Office of the Public Advocate

The Public Advocate offered no testimony in this proceeding but did cross-examine all witnesses. The Public Advocate's position is that the plan as submitted by Maine Yankee is a reasonable one and that the cost estimate in particular is reasonable. The Public Advocate attempted to show, particularly through the cross-examination of Dr. Austin, that the Staff's estimate was too high and that several factors, when taken together, suggest that decommissioning costs may level off or decrease in the future. The Public Advocate also argues that because cost estimates have increased substantially over the past decade and because FERC in 1988 for the first time included a contingency factor in its approved decommissioning fund rate, it is likely that even if the

$167,000,000 is on the low side, future FERC-approved decommissioning estimates should be higher and hence adequate.

The Public Advocate accurately notes in its brief that the testimony elicited from both Mr. Lydon and Dr. Austin indicates that there is considerable uncertainty about what future decommissioning costs will look like. According to the Public Advocate, this uncertainty provides support for adopting Maine Yankee's proposed cost of decommissioning.

The first area of uncertainty is that associated with the possible deregulation of some low-level radioactive waste, thereby possibly reducing the volume of low-level waste requiring disposal at a distant dump site. Such a scenario would presumably lower the overall cost of decommissioning relative to current estimates. A second area of uncertainty noted by the Public Advocate is that associated with the burial cost estimates for the low level waste. The TLG study submitted by Maine Yankee assumes the availability in 2008 of a burial site within 300 miles of Wiscasset with costs equivalent to those in effect at the Barnwell, S.C. facility in 1987. See Maine Yankee Exhibit 2, at 44. Because the Barnwell facility will stop accepting Maine waste by January 1, 1993, Maine must make other arrangements. According to Mr. Lydon, by late 1992, Maine Yankee should have a clearer view of the actual future cost of disposal than it does now. Tran. C-61,62. Furthermore, Mr. Ward elicited an acknowledgment from Dr. Austin during cross-examination that it was at least possible that because the number of waste facilities would be increasing, the cost of disposal could theoretically decrease. Tran. D-36. The point of the Public

Advocate's argument concerning this uncertainty is that it is better to wait until at least 1992, when more information will be available, to change decommissioning estimates rather than engage in speculation now.

The Public Advocate in its Brief also brings to our attention the possibility that at least some components of the cost of decommissioning will decrease over time. These include treatment of "greater than class C waste," technological improvements in decommissioning, and the possible use of Maine Yankee as Maine's low level waste depository. The Public Advocate also argues that because Maine Yankee may operate beyond its current expected shutdown date, perhaps by as many as four years, the total annual contribution need not be as high as that suggested by Dr. Austin. See Tran.C-72,D-27.

4. Analysis

Section 4353(3)(B)(1) requires the Commission to approve the plan if the licensee has provided reasonable assurance that the estimated cost of decommissioning is reasonable. Section 4353(3)(B)(6) requires the Commission to approve the plan if the licensee has provided reasonable assurance that contributions to the fund are equitably spread over the useful life of the plant to the extent feasible. The requirement to "equitably" spread the cost over the useful life of the plant results necessarily in some annual amount that must be contributed. By examining an annual amount and the amount of time over which it is collected it is possible to determine whether the cost has been spread equitably. In addition, section 4353(4) requires the Commission, based upon the plan

submitted by the utility, to establish the cost of decommissioning and establish a schedule of monthly payments into the fund "as necessary and convenient to meet that cost of decommissioning at the time of closing." Pursuant to section 4353(4) "[f]or purposes of cost estimates, the method of decommissioning shall be the method of prompt removal and dismantlement, unless the United States Nuclear Regulatory Commission . . . requires another method." Our review and analysis of the evidence is necessarily guided by these as well as other sections of the NDFA.

Staff argues in its brief that the total estimated cost of decommissioning is relatively unimportant and that the only number with "real meaning" (Austin, Tran. D-21) is the annual amount. Dr. Austin testified that "the annual payment is the one that has a real meaning in the – our estimate today of what it will actually cost to decommission the plant twenty years down the road isn't particularly interesting . . . Something will happen based on the 14 million. Nothing particularly will happen based on the 225." Tran. D-21. While the total cost of decommissioning may be uninteresting and, as all the parties would apparently agree, somewhat speculative, the statute nevertheless requires us to approve what we believe to be a reasonable estimate of the total cost of decommissioning. Once a total cost is established we must then spread that cost as equitably as possible over the useful life of the plant. Because an annual amount is necessarily derived from the estimated total cost, we believe that the total cost is at least as important as the annual contribution although we also agree with Staff that setting the best estimate on an annual basis is important.

Staff recommends that we find $225 million to be a reasonable estimate of the total cost of decommissioning. As we discuss above, Staff's estimate is based on the TLG study and is adjusted upward to reflect various perceived upward price pressures. While Staff apparently believes the TLG study to be the best available starting point for analysis, it also unequivocally argues that it is very speculative and subject to error, apparently by as much as approximately 30%. The reasons Staff discusses for adjusting that amount upward are as follows:

- level of public concern over disposal of nuclear waste
- availability and cost of disposal sites
- possibility of premature shutdown
- possibility of extended licensing or mothballing of the plant for use as a disposal facility
- historic trend of decommissioning costs to rise faster than inflation
- possible difficulties of collecting increased costs from a single asset company if funds are inadequate
- intergenerational equity concerns

See Staff Brief at 7.

We agree with Staff that each of the enumerated items are of some concern and we have accordingly considered them in deciding upon a total decommissioning cost level. Dr. Austin recognizes, correctly we believe, that these concerns are very difficult, if not impossible to

quantify. Yet Staff has quantified these concerns in a manner that somehow sums to $14 million a year, which they believe is a prudent level of collection. We do not believe this to be a certain enough number upon which to approve a decommissioning cost estimate. Dr. Austin's concerns are necessarily speculative and it is not clear that all of the expressed concerns will result ultimately in higher decommissioning costs. For example, the uncertainty associated with the availability and cost of disposal sites may have a downward cost effect. Similarly, the possible extension of Maine Yankee's life beyond 2008 suggests that lower annual contributions, spread over more years, would cover the total cost of decommissioning in an adequate manner. The level of public concern over disposal of nuclear waste and the associated concern over a possible premature shutdown are both extremely difficult to translate into dollar amounts at this time and we are uncomfortable doing so.

Our review of the record leaves us with the impression that while costs may rise overall, at least some components of decommissioning costs, such as those attributable to improved decommissioning technologies, may in fact decrease. We are unable to accept Staff's recommendation for the estimated cost of decommissioning because it essentially amounts to a speculative number added to an already somewhat speculative site specific-based engineering study.

Maine Yankee's estimated cost of decommissioning, $167,000,000, is based primarily on the fact that that is the amount approved by FERC in its rates. Although Maine Yankee has consistently maintained that it believes $167,000,000 to be an adequate number independent of its

inclusion in its wholesale rates and in its brief maintains that we should defer to FERC not only because we are preempted but also because of the independent review it received there, we cannot, based upon a review of the record in this proceeding, agree that $167,000,000 is the amount we should approve for a total decommissioning cost estimate. All the parties to this proceeding, including Maine Yankee, believe the TLG study to be the best available study upon which to base a decommissioning cost estimate. Staff nevertheless argues that other factors, when weighed together, compel a higher number at least on a yearly basis. Maine Yankee, on the other hand, argues that factors outside the four corners of the TLG study compel a lower decommissioning cost estimate. The factors cited by Maine Yankee and supported by the Public Advocate leave us unconvinced that the most reasonable decommissioning cost estimate is $167,000,000. We are unpersuaded by the two primary arguments advanced by Maine Yankee that $167,000,000 is the most reasonable estimate: 1) that we are preempted by FERC and 2) FERC has independently reviewed the estimate and found it reasonable; therefore we should defer to that finding. Neither argument tells us why the TLG study should not be accepted as submitted, especially since Maine Yankee, in its most recent FERC proceeding, argued vigorously for the amount contained in the TLG study. *See* Staff Exhibit 2. We find that the estimated total cost of decommissioning is $178,097,900 (in mid-1987 dollars), as recommended by the TLG study. We also find that collection of that amount over the anticipated remaining useful life of the plant is reasonable financial planning at present.

The TLG study estimates the total cost of decommissioning utilizing the prompt removal and dismantlement method. As noted by the Study, "[t]hese estimates reflect the site-specific features of the Maine Yankee Station and the current costs in radioactive waste shipping and burial costs." Maine Yankee Exhibit 2, page 106. The following is a summary of the decommissioning costs using the prompt removal and dismantlement method:

Work Category	Costs (Thousands)	Percent of Total Costs
Prompt Removal/Dismantling		
Decontamination	4,249	2.98
Removal	33,383	23.43
Packaging	3,435	2.41
Shipping	3,321	2.33
Burial (off-site)	32,278	22.66
Decommissioning Staffs	45,583	31.99
Other	20,230	14.20
Total	178,098	100.00

Maine Yankee Exhibit 2, page 107.

The report notes that the total amount includes a contingency factor on all activities. The contingency amount is 25%. Maine Yankee and the Public Advocate argue that the $167,000,000 figure functionally includes a contingency factor of 17.2% and that it is only the contingency which is being reduced. While it may be true that it is only the contingency factor which is being reduced, it nevertheless appears to be reduced across the board for all activities in a very imprecise manner. Furthermore, given the possibility that at least some costs will be rising, it does not seem prudent to cut a contingency

factor specifically designed to cover unforeseen cost increases.

We believe that the $178,097,900 figure recommended by the TLG study strikes a reasonable balance between the positions advocated by Maine Yankee and the OPA on the one hand and Staff on the other. We believe rational arguments can be made that at least some costs will decrease over time, as suggested by the OPA, and some will undoubtedly increase, as suggested by Staff. We have chosen $178,097,900 as a reasonable estimated cost of decommissioning because it is the amount recommended in the TLG study and because that number, we believe, reflects at least to some degree the concerns raised by Staff that costs may increase.

The TLG study itself makes clear that estimating decommissioning costs is an evolving process subject to revision:

> As actual dismantling experience on large reactors becomes available . . . cost estimates must be modified to reflect this experience . . . It is therefore prudent that this cost estimate be reviewed periodically, and updated/revised as required.

Maine Yankee Exhibit 2, page 106. We agree that the TLG cost estimate we adopt here as the estimated cost of decommissioning should be revised and updated. The Study is now two years old and events in the nuclear industry may soon render aspects of the plan obsolete.

We are mindful of Dr. Austin's admonition that a decommissioning cost estimate should not be based solely on engineering studies but that it also be based on

lent financial planning. We agree that prudent financial planning should be a part of any cost estimate. Section 4353(2) requires only that the estimate of decommissioning costs be *based* upon an engineering report. We expect that future decommissioning studies submitted by Maine Yankee will explicitly incorporate financial planning analysis including analysis of the availability and cost of disposal sites (both low level and high level waste) and will take account of the historic trend of estimates to escalate faster than inflation. We believe these and other aspects of prudent financial planning should be an integrated part of any site-specific study.

B. Additional Aspects of the Decommissioning Plan

The NDFA provides that the Commission shall approve the decommissioning financing plan if it finds that the licensee, in the judgment of the Commission, has provided reasonable assurance that a litany of statutory criteria have been met. We have discussed above the first of those criteria, the overall cost of decommissioning. We discuss here the remaining factors as set forth in section 4353(3)(B)(1)-(9).

We note that in response to a question from the Examiner concerning whether he had any problems with the non-cost related aspects of the plan, Dr. Austin responded that he had no reason to think that they were not acceptable. Tran. D-41-42. Staff in its brief does not take issue with any aspect of the plan other than the estimated cost of decommissioning.

In its original Motion to Amend the Interim Decommissioning Financing Plan, Maine Yankee sets forth item by item the extent to which elements of the new plan supersede the interim plan. For the most part, the plan has been entirely updated. Maine Yankee notes in its Motion, however, that except as amended by its new plan, the original filing stands as approved as part of the interim plan.

1. The Estimated Time of Closing – Section 4353(3)(B)(1)

The statute provides that the Commission shall approve a decommissioning financing plan if it finds, *inter alia*, that the estimated time of closing the nuclear plant is reasonable. In support of this criteria Maine Yankee offered Maine Yankee Exhibit 2, pp. 4-10, which is the NRC amendment to Maine Yankee's facility operating license. This amendment provides, *inter alia*, that the operating license expires at midnight, October 21, 2008. Maine Yankee believes that the expiration of its license is the best objective estimated time for the closing of the nuclear power plant. According to Mr. Lydon, Maine Yankee "fully expect[s] the plant to operate until October 21, 2008." Lydon Prefiled at 9.

Although the Public Advocate elicited testimony suggesting the plant could possibly operate beyond the year 2008, *see* Tran. C-72, D-27, and Staff argues the plant could shut down prematurely, *see* Austin Prefiled at 7-10, neither party argues that 2008 is an unreasonable estimated date of closing. We find that 2008 is a reasonable

estimated time of closing and therefore approve this aspect of the decommissioning financing plan.

2. Share of Estimated Cost of Decommissioning – Section 4353(3)(B)(2)

Section 4353(3)(B)(2) requires the Commission to make a positive finding, prior to approval of a plan, that the share of the estimated cost of decommissioning for each electric utility to which a nuclear plant supplies power is reasonable. In support of this finding, Maine Yankee presented Maine Yankee Exhibit 2 at 172. This exhibit shows the yearly levelized decommissioning collection of $9,073,943 based on the total among all of Maine Yankee's customers. The charges are assessed *pro rata* based on the amount of output to which each of Maine Yankee's customers is entitled.

We find that the manner in which the costs are shared is reasonable; that is, *pro rata* based on the amount of output to which each of Maine Yankee's customers is entitled. The annual amount to be charged, of course, must be adjusted in accordance with our finding concerning the cost of decommissioning.

3. Adequacy of Principle and Income to Cover Estimated Cost of Decommissioning – Section 4353(3)(B)(3)

The NDFA requires that before the Commission can approve a decommissioning financing plan it must find that the principle and income which will accumulate in the decommissioning trust fund at the estimated time of closing the plant will be adequate to cover the estimated

cost of decommissioning plus the expenses of administering the fund. In support of this finding, Maine Yankee has submitted evidence regarding the estimated growth of the fund, both principle and income, which supports a finding that funds will be adequate at the time of closing of the plant. Maine Yankee has estimated that at the time of the closing of the plant in the year 2008 the trust fund will accumulate $461,946,000 in year end 2008 dollars. This assumption is based on an assumed inflation rate of 5% and an assumed after tax return of 6.30%. This assumption, of course, further assumes continued annual collections at the rate of $9,073,043. Maine Yankee Exhibit 2 at 143. Mr. Lydon testified that as of September 30, 1988, the assets of the qualified fund were reporting an average yield to maturity of 6.60% and the non-qualified fund has an average yield to maturity of 6.88% In addition, as a result of the 5% inflation factor, the decommissioning fund estimated amount now equates to $188.7 million as of year end 1989. Mr. Lydon further testified that today in the fund there is 20 to 25% of the total amount (i.e., $37.7 million). Trans. C-59.

We find this aspect of Maine Yankee's plan to be reasonable and would expect the fund to grow in approximately the manner suggested by Maine Yankee. Maine Yankee must, of course, substitute $178,097,900 as the total cost of decommissioning with a yearly contribution of approximately $9,793,904. This amount is calculated on the same basis as the $9,073,900 figure which Maine Yankee proposed. We believe the calculation should be updated to include the actual contributions and investment returns experienced in 1988 and 1989.

4. Judicious Investment of Funds; Licensee Established Committee – Sections 4353(3)(B)(4) and 4353(3)(E)

The Act requires the Commission to find, *inter alia*, that the provisions of the proposed form of the decommissioning trust fund will insure that the funds in the trust are judiciously invested and will adequately protect the funds until decommissioning is completed. 35-A M.R.S.A. § 4353(3)(B)(4). That same section further provides that in the event the licensee establishes its own decommissioning fund committee that the licensee-established committee will insure that the funds are judiciously invested and will adequately protect the funds until decommissioning is completed. Maine Yankee submitted several documents and other evidence which support this requirement.

First, with respect to the trust, Maine Yankee submitted the Indenture of Trust dated as of October 12, 1982, the First Supplemental Indenture, dated as of October 1, 1987, and the Maine Yankee Decommissioning Trust (Master Trust) dated as of March 14, 1988. Maine Yankee Exhibit 2 at 174-260. These documents provide for the creation of trusts to hold all decommissioning payments made to Maine Yankee and any income earned on those payments solely for the purposes of meeting decommissioning expenses. The most recent document, the Master Trust, holds in trust both the non-qualified trust fund and in addition a qualified trust fund which together comprise the Maine Yankee decommissioning trust. The trust further specifically provides that investments of trust assets may only be made as permitted by Section

468A(B)(4)(C) of the Internal Revenue Code and as provided by 35-A M.R.S.A. § 4355(3)(B). Maine Yankee Exhibit 2 at 227. Disbursements may also be made to make refunds of amounts held in the qualified trust or the non-qualified trust fund if required to do so by valid order of FERC or any other regulatory agency having jurisdiction over Maine Yankee, to pay federal income taxes due and payable with respect to income of the non-qualified trust fund, and to pay reasonable administrative expenses of the trust fund. *Id.*

The indenture of trust further specifically provides for the duties of the Decommissioning Fund Committee which duties we find are consistent with the responsibilities of the Decommissioning Fund Committee as set out in 35-A M.R.S.A. § 4354(6). Maine Yankee Exhibit 2 at 245-246.

Maine Yankee has, of course, elected to set up a licensee-established trust fund committee pursuant to section 4354. The Committee will consist of five members appointed by the Board of Maine Yankee, three of whom shall be employees or board members of Maine Yankee, two of whom shall be members of the general public having no affiliation with Maine Yankee or any of its sponsors and one additional member appointed by the Governor pursuant to section 4354(1). See Lydon Prefiled at 18. The Governor may appoint a member of the Committee after the creation of the committee has been approved by the Commission. The three proposed members of the committee that are employees or board members of Maine Yankee are, subject to Board approval: 1) Charles E. Monty, Chairman of the Board of Directors, Maine Yankee; 2) Patrick S. Lydon, Vice President of

Finance and Administration, Maine Yankee; and 3) Lee E. Maillet, Treasurer and Chief Accounting Officer, Maine Yankee. Lydon Prefiled at 18-19; Tran. C-9-11. The two proposed members of the general public are James B. Longley, Jr. and John Cancelarich. See Supplemental Prefiled of Patrick S. Lydon; Tran. C-11, D-79-80.

We find that this proposed licensee-established decommissioning fund committee will be able to carry out the responsibilities and duties set forth in section 4354(6), that the fund will be managed in accordance with the requirements of section 4355 and that it is in the public interest.

5. Withdrawal of Assets – Section 4353(3)(B)(5)

The Indenture of Trust dated March 14, 1988, creating the Maine Yankee Master Trust, specifically provides that assets held by the trustee may not be withdrawn from the trust fund without the authorization of the Decommissioning Fund Committee and the MPUC. Maine Yankee Exhibit 2 at 228-233. The only exception to this requirement is that the trustee may withdraw money from the qualified trust fund for the payment of income taxes due from the trust fund as required by federal law. Maine Yankee Exhibit 2 at 232. Under no other circumstances may assets from the fund be withdrawn without the approval of the Decommissioning Fund Committee prior to, or even during, decommissioning.

We find that Maine Yankee has provided reasonable assurance that the requirements of section 4353(3)(B)(5) will be met.

6. Contributions to the Fund: Equitably Spread Over Useful Life of Plant to Extent Feasible

35-A M.R.S.A. § 4353(3)(B)(6) provides an intergenerational equity requirement which specifically mandates "contributions to the fund are equitably spread over the useful life of the plant to the extent feasible." Maine Yankee proposes in its filing to collect $167,000,000 in equal installments over the remaining 18 years of the plant's useful life. Maine Yankee is currently contributing an annual levelized collection amount of $9,073,043 collected monthly from its customers.

Both Maine Yankee and Staff appear to agree that a reasonable way to collect the total cost of decommissioning is through levelized collection over the remaining useful life of the plant, although the parties disagree on the amount that should be collected. Levelized funding also appears to preserve the deductibility of the contributions for federal income tax purposes. *See* IRC § 468A(d). In addition, we note that section 4351(2) of the NDFA states as a finding of the Legislature that funds for decommissioning should be collected "during the remaining useful life of the plant. . . . "

We find that a levelized contribution to the fund over the anticipated remaining useful life of the plant is reasonable. Maine Yankee shall recalculate the annual and monthly levelized amount in accordance with the terms of this Order.

7. Plans and Options for Insuring Against or Otherwise Financing Any Short Fall in the Fund Resulting from A Premature Closing – Sections 4353(3)(B)(7) and (8) and 4351(6)

Prior to approval of a decommissioning financing plan the Commission must find that "the plans and options for insuring against or otherwise financing any short fall in the fund resulting from a premature closing" are adequate and reasonable. In support of this finding Maine Yankee has submitted copies of its insurance policies, Maine Yankee Exhibit 3, and copies of its contractual agreements with the sponsoring companies, Maine Yankee Exhibit 2 at 261-314. With respect to the insurance contracts Mr. Lydon testified:

> in case of accident, Maine Yankee has nuclear property insurance totalling $1.875 billion as of November 15, 1989, to cover losses due to accidents. Such funds are available to stabilize and decontaminate the plant, restore to use, or if necessary decommission the plant.

Lydon Prefiled at 17.

Maine Yankee has also provided copies of its contracts with its sponsors for the purpose of establishing the sponsors' continuing contractual obligation to pay for decommissioning. These contracts essentially provide, except in the case of an eminent domain taking, or exercise of similar right or power, that the sponsors will continue to be billed and to pay decommissioning costs on a monthly basis, irrespective of the operation of the plant. Maine Yankee Exhibit 2 at 269-291; Lydon Prefiled at 15; Tran. C-32. These contracts specifically provide that

this contractual obligation to continue to pay decommissioning costs will continue until the later of either (1) thirty days after the date on which the last financial obligation of Maine Yankee which constitutes an element of the purchase price (this includes decommissioning cost) has been extinguished by Maine Yankee; or (2) thirty days after the date on which Maine Yankee is finally relieved of any obligations under the last of any licenses which it now holds or may later be issued by the Nuclear Regulatory Commission. Maine Yankee Exhibit 2 at 291-315. The additional power contract specifically provides that if the useful service life of the plant ends prior to January 2, 2003, then the only provision of the contract which will continue to apply will be that provision governing decommissioning expenses and obligations. *Id.* We note that all of these amendments to the power contract have been approved by FERC. In the event of a premature shut down of the plant these contracts would be the basis, along with the FERC tariff, for Maine Yankee to continue to bill its customers for decommissioning costs. With respect to these contracts FERC has stated the following:

> Maine Yankee's power contracts guarantee that its customers will pay the full cost of decommissioning even if the unit shuts down prematurely (i.e., before the end of its licensed life) and provides no service from which to collect rates. Maine Yankee, therefore, has a guarantee of total recovery of decommissioning costs, without the necessity for a hearing, regardless of when its plant shuts down.

Maine Yankee Atomic Power Co., 43 F.E.R.C. ¶61,453.

As noted by both Maine Yankee and Staff, Maine Yankee's power purchase agreements concerning decommissioning do not apply when premature shutdown is due to eminent domain or the exercise of some similar right or power. See Austin Prefiled at 9; Tran. C-70. We view this uncertainty with some concern but note that section 4356 of the NDFA holds the licensee primarily responsible for decommissioning and, if the assets of the licensee are insufficient to cover the remaining cost of decommissioning after the trust fund is exhausted, the owners are held jointly and severally liable for the safe and proper decommissioning of the nuclear power plant. Section 4356 does not distinguish among the various reasons for a shutdown; rather it speaks only of responsibility for decommissioning, for whatever reason.

We find that Maine Yankee has provided reasonable assurance that its plans and options for insuring against or otherwise financing any short fall in the fund resulting from a premature closing are adequate and reasonable and that the owners are legally bound to accept their respective shares of the ultimate financial responsibility for decommissioning and the plan reflects full compliance with section 4356.[5]

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[5] We note that the exception in the power contracts concerning eminent domain or other similar exercise of right or power could be viewed as inconsistent with the express provisions of section 4356. Section 4356, of course, rests ultimate financial responsibility on the owners, jointly and severally, without reference to a reason compelling decommissioning. In our view, Maine Yankee's owners cannot by contract dispose of statutorily imposed duties. Thus, the exception in the Power Contracts may be without legal effect.

8. Periodic Review – Section 4353(3)(B)(9)

The NDFA provides that prior to approving a decommissioning financing plan the Commission must find that there is reasonable assurance that the Maine Yankee Decommissioning Financing Plan will be periodically reviewed and revised to reflect more closely the cost and available techniques for decommissioning. The Commission must further find that the update shall occur at least every five years. The actual experience of Maine Yankee and the testimony of Mr. Lydon support a positive finding on this statutory element. First, Maine Yankee has commissioned and revised its decommissioning financing cost estimates three times in the period from 1981 through the present. Lydon Prefiled at 5. In addition, Mr. Lydon testified that Maine Yankee is planning to reexamine its decommissioning cost estimate every three to five years. *Id.* at 3.

We believe that periodic review of the decommissioning financing is fundamental and essential. As all parties agree, decommissioning costs are evolving as better information becomes available and industry experience is gained. Maine Yankee's TLG Study was completed in December 1987. It appears that already, just two years after its completion, it may be becoming outdated. Furthermore, it appears that a great deal more information will be learned between now and 1992 concerning disposal costs, federal regulatory treatment of various classes of waste and thus their contribution to decommissioning costs, and decommissioning technologies. We therefore direct Maine Yankee, in order to comply with

section 4353(3)(B)(9), to submit a new site-specific decommissioning cost plan no later than January 1, 1993 for review by this Commission. The Company shall consult with Commission Staff and the Public Advocate prior to commissioning the study about the nature and scope of the study to be undertaken and who the Company proposes shall conduct the study. The Company and the entity conducting the study shall consult with Commission Staff and the Public Advocate on a regular basis during the course of its preparation concerning all assumptions, calculations and methodologies used in arriving at the decommissioning cost estimate.

VII. STIPULATION

Our disposition of this case as described above leads us to reject the stipulation filed in this case by the OPA, IECG and Maine Yankee. We believe that based on the record developed in this case, $178,097,900 is the most reasonable estimated cost of decommissioning.

VIII. CONCLUSION

We find that Maine Yankee's decommissioning financing plan has failed to meet the criteria set forth in section 4353(3)(B)(1) because the plan does not provide reasonable assurance that the estimated cost of decommissioning is reasonable. We find that all other aspects of the plan have met the criteria set forth in section 4353(3)(B) to the extent discussed above. We therefore reject the plan and order that it be modified in accordance with section 4353(3)(C). In particular, we order that the portion of the plan submitted pursuant to section

4353(3)(B)(1) concerning the cost of decommissioning be modified to reflect a total cost of decommissioning of $178,097,900 in 1987 dollars as set forth in the TLG study. The annual and monthly contributions to be paid by Maine Yankee into the fund shall be levelized over the remaining useful life of the plant.

We acknowledge that the legal issues raised by this proceeding are novel and complex and appreciate Maine Yankee's, the OPA's and IECG's concerns regarding the resources necessary to litigate those issues. We believe we are, however, compelled by state law to act in the manner specified in the NDFA. Absent an indication of clear preemptive intent on the part of Congress, we decline to ignore the mandate of the statute.

Accordingly, it is

ORDERED

1. That Maine Yankee's Motion to Amend Interim Decommissioning Financing Plan and to Approve Interim Plan as Amended as the Final Decommissioning Financing Plan filed on March 20 ,1989 is granted to the extent discussed in the body of this Order.

2. That Maine Yankee's decommissioning financing plan is rejected as submitted and modified in the manner described above in this Order. The plan shall be approved as modified.

3. That pursuant to 35-A M.R.S.A. section 4353(4), the cost of decommissioning the Maine Yankee atomic power plant is $178,097,900 in 1987 dollars. Maine Yankee shall pay into the Decommissioning Trust Fund on a

monthly basis the amounts reflected in the schedule of monthly payments described below in ordering paragraph 4.

4. That pursuant to 35-A M.R.S.A. § 4353(4), Maine Yankee shall submit, as part of a compliance filing, a schedule of monthly payments to be made into the decommissioning trust fund. The schedule shall reflect the terms of this Order and shall specifically reflect a total cost of decommissioning of $178,073,900 in mid-1987 dollars. The schedule, and all calculations made to develop that schedule, shall contain all assumptions presently incorporated in Maine Yankee Exhibit 2, page 145, updated for actual contributions and investment results in 1988 and 1989. We hereby delegate to the Director of Finance or his designee the authority to review and approve the compliance filing.

5. That the interim decommissioning financing plan approved by this Commission on August 29, 1983 is hereby terminated.

6. That pursuant to 35-A M.R.S.A. section 4353(6) Maine Yankee shall submit for review to this Commission an updated site-specific decommissioning financing plan no later than January 1, 1993. At that time this Commission shall conduct a review of Maine Yankee's Decommissioning financing plan. The review shall include all of the factors set forth in section 4353(6)(A)(1)-(5).

Dated at Augusta, Maine, this 22nd day of February, 1990.

BY ORDER OF THE COMMISSION

Charles A. Jacobs
Charles A. Jacobs
Administrative Director

A true copy.
Attest: /s/ Charles Jacobs
Charles A. Jacobs
Administrative Director

COMMISSIONERS VOTING FOR: Gordon
Harrington
Paine

APPENDIX C

Title 35-A; chapter 43
SUBCHAPTER III

DECOMMISSIONING

Section
4351. Short title; findings.
4352. Definitions.
4353. Decommissioning financing plans; physical decommissioning plan.
4354. Decommissioning fund committee.
4355. Decommissioning trust fund.
4356. Responsibility for decommissioning.
4357. Procedure, liability and penalties incorporated by reference; construction.
4358. Cost of review.
4359. Enforcement.

§ 4351. Short title; findings

This subchapter shall be known and may be cited as the "Nuclear Decommissioning Financing Act."

The Legislature has made the following findings.

1. Proper decommissioning is essential. The Legislature finds that timely proper decommissioning of any nuclear power plant beginning at the time of its closing is essential to protect public health, safety and the environment and that the cost of decommissioning will be significant.

2. Collection of funds to pay for decommissioning costs. To ensure that the customers who received the benefits of these facilities pay for these decommissioning costs, the Legislature finds that it is prudent for the State to require the licensee operating a nuclear power plant in the State to collect sufficient funds during the remaining useful life of the plant to pay for these costs.

3. **Trust fund.** The Legislature finds that the best way to ensure that the funds collected will be available when they are needed for decommissioning is to require that the funds be placed in a separate trust fund for each plant and invested by a trustee until they are needed for decommissioning.

4. **Decommissioning fund committee.** The Legislature finds that it is in the public interest to have a decommissioning fund committee responsible for the prudent management of the trust fund. That committee may be established by the licensee, with Public Utilities Commission approval, or publicly established, but in either case would be subject to the requirements of this subchapter.

5. **Taxes.** The Legislature finds that funds set aside for decommissioning protect the people of the State and thus serve an essential governmental function, that payment of taxes on these funds would be an unreasonable and inappropriate burden on the ratepayers and that the income earned by the fund should be tax exempt and payments made to the fund by the licensee should be tax deductible.

6. **Premature closing of plant.** The Legislature finds that assurance is needed that funds will be available for the cost of decommissioning which would occur if a nuclear power plant is prematurely closed.

§ 4352. Definitions

As used in this subchapter, unless the context indicates otherwise, the following terms have the following meanings.

1. **Closing.** "Closing" means the time at which a nuclear power plant ceases to generate electricity and is retired from active service.

2. **Decommissioning.** "Decommissioning" means the series of activities undertaken beginning at the time of closing of a nuclear power plant to ensure that the final disposition of the site or any radioactive components or material, but not including spent fuel, associated with the plant is accomplished safely, in compliance with all applicable state and federal laws. Decommissioning includes activities undertaken to prepare a nuclear power plant for final disposition, to monitor and maintain it after closing and to effect final disposition of any radioactive components of the nuclear power plant.

3. **Decommissioning expenses.** "Decommissioning expenses" means the following:

A. All reasonable costs and expenses of removing a nuclear power plant from service, including, without limitation, dismantling, mothballing, removing radioactive waste material except spent fuel to temporary or permanent storage sites, decontaminating, restoring and supervising the site, and any costs and expenses incurred in connection with proceedings before governmental regulatory authorities relating to the authorization to decommission the plant;

B. All costs of labor and services, including services of foremen, inspectors, supervisors, surveyors, engineers, counsel and accountants, performed in connection with the decommissioning of the plant, and all costs of materials, supplies, machinery, construction equipment and apparatus acquired for or in connection with the decommissioning of the plant. It is

understood that any amount, exclusive of proceeds of insurance, realized by a licensee as salvage on or resale of any machinery, construction equipment and apparatus, the cost of which was charged as a decommissioning expense, shall be treated as a deduction from the amounts otherwise payable on account of the cost of decommissioning of the plant; and

C. All overhead costs applicable to the plant during its decommissioning period, including, but not limited to, taxes, other than taxes on or in respect of income; licenses; excises and assessments; casualties; surety bond premiums and insurance premiums.

Without limiting the generality of this subsection, amounts expended or to be paid with respect to decommissioning a nuclear power plant shall constitute part of the decommissioning expenses if they are, or when paid will be, either properly chargeable to any account related to decommissioning of a nuclear power plant in accordance with the systems of accounts then applicable to the licensee, or properly chargeable to decommissioning of a nuclear power plant in accordance with then applicable regulations of the United States Nuclear Regulatory Commission, Federal Energy Regulatory Commission or any other regulatory agency having jurisdiction.

4. Decommissioning financing plan. "Decommissioning financing plan" means the plan approved by the commission under section 4353.

5. Decommissioning fund committee. "Decommissioning fund committee" means a committee established to have overall responsibility, as described in section 4354, for a decommissioning trust fund.

6. Decommissioning trust fund or fund. "Decommissioning trust fund" or "fund" means a trust fund set up as prescribed in sections 4353 and 4355 to hold money for the eventual purpose of paying decommissioning expenses.

7. Escrow account. "Escrow account" means an account established under commission rules to hold funds collected under an interim decommissioning financing plan promulgated under section 4353, subsection 5, until a decommissioning trust fund is established or to hold funds for other temporary purposes under this subchapter.

8. Licensee. "Licensee" means the holder of the operating permit from the United States Nuclear Regulatory Commission for a nuclear power plant.

9. Nuclear power plant or plant. "Nuclear power plant" or "plant" means a nuclear fission thermal power plant situated in this State.

10. Owner. "Owner" means any electric utility which owns any portion of a nuclear power plant, whether directly or through ownership of stock in a company which owns any portion of a nuclear power plant or through membership in a holding company which owns any portion of a nuclear power plant or through other means.

11. Premature closing. "Premature closing" means the closing of a nuclear power plant before the projected date of decommissioning, as projected in the decommissioning financing plan under section 4353.

12. Prompt removal and dismantlement. "Prompt removal and dismantlement" means to immediately remove radioactive or radioactively contaminated material down to allowable residual levels which permit release of the property for unrestricted access.

13. Trustee. "Trustee" means a bank or trust company qualified to act as a fiduciary in this State.

§ 4353. Decommissioning financing plans; physical decommissioning plan

1. Submission of plans. Decommissioning financing plans shall be submitted as follows.

A. Any licensee receiving a certificate of public convenience and necessity under section 3132 for a nuclear power plant shall submit a decommissioning financing plan for the plant to the commission not less than one year prior to beginning commercial operation of the plant.

B. Any licensee operating a nuclear power plant on July 13, 1982, shall submit a proposed decommissioning financing plan for the plant to the commission as soon as possible, but not later than September 11, 1982, or such later date as the commission may consider appropriate.

2. Content of plan. A decommissioning financing plan submitted under subsection 1 shall include:

A. An estimate of the time of closing of the nuclear power plant;

B. An estimate of the cost of decommissioning the plant expressed in dollars current in the year the plan is prepared and based upon an engineering report issued any time within 3 years of

the date the plan is submitted to the commission;

C. The share of the estimated decommissioning expenses attributed to each electric utility to which the plant supplies power;

D. Plans for periodic review and updating of the plan, including the cost of decommissioning estimated under paragraph B, consistent with subsection 6;

E. Plans for establishing as soon as possible a decommissioning trust fund adequate to pay the cost estimated under paragraph B, consistent with subsection 4 and section 4355;

F. Plans and options for insuring against or otherwise financing any shortfall in the fund resulting from a premature closing of the nuclear power plant;

G. Reasonable assurance of responsibility in the event of insufficient assets in accordance with section 4356;

H. A general description of the stages by which decommissioning is intended to be accomplished, but only at the level of detail necessary to support the cost estimate of paragraph B;

I. If the licensee intends to establish its own decommissioning fund committee, a statement of its intent to do so, together with its proposed membership and a copy of the proposed decommissioning trust and its plan for implementing the trust and establishing the committee;

J. A fully executed decommissioning financing agreement between the licensee and each owner, evidencing each owner's acceptance of its respective share of the ultimate financial responsibility for decommissioning. In satisfaction of

this requirement, the licensee may submit existing ownership agreements together with documentation from each owner of the applicability of the agreement to the case of financial responsibility for decommissioning; and

K. Any other information related to the financing of decommissioning which the commission requests.

3. **Approval of plan.** The plan shall be approved as follows.

A. The commission shall conduct a public hearing on the proposed decommissioning financing plan.

B. The commission shall approve the decommissioning financing plan if it finds that the licensee, in the judgment of the commission, has provided reasonable assurance that:

(1) The estimated time of closing of the nuclear power plant and the estimated cost of decommissioning are reasonable;

(2) The share of the estimated cost of decommissioning for each electric utility to which the plant supplies power is reasonable;

(3) The principal and income which will have accumulated in the decommissioning trust fund at the estimated time of closing the plant will be adequate to cover the estimated cost of decommissioning, plus the expenses of administering the fund;

(4) The provisions of the proposed form of the decommissioning trust fund will ensure that the funds in the trust are judiciously invested and will adequately protect the funds until decommissioning is completed and, in the event the licensee proposes to

establish its own decommissioning fund committee, that the licensee-established committee will ensure that the funds in the trust are judiciously invested and will adequately protect the funds until decommissioning is completed;

(5) The assets in the fund cannot be withdrawn unless approved by the decommissioning fund committee under section 4355, subsection 5, prior to completion of decommissioning;

(6) Contributions to the fund are equitably spread over the usefui life of the plant to the extent feasible;

(7) The plans and options for insuring against or otherwise financing any shortfall in the fund resulting from a premature closing are adequate and reasonable;

(8) The owners are legally bound to accept their respective shares of the ultimate financial responsibility for decommissioning and the plan reflects full compliance with section 4356; and

(9) The plan will periodically be reviewed and revised to reflect more closely the costs and available techniques for decommissioning. This update shall occur at least every 5 years.

C. If the commission finds that the decommissioning financing plan does not meet the criteria under paragraph B, the commission shall reject the plan and order that it be modified as the commission determines necessary to meet those criteria.

D. The commission shall take final action on the proposed decommissioning financing plan within 180 days after the filing date. The filing

date shall be the date when the commission notifies the applicant that the filing is complete. If the commission does not notify the applicant of any deficiencies in the information in the application within 60 days of receipt, the application shall be deemed complete as of the date of receipt.

E. If the licensee requested approval of a licensee-established decommissioning fund committee, the commission shall approve the plan, including the plans for implementing a licensee decommissioning fund committee and a decommissioning trust fund, with such modifications as the commission finds necessary to meet the criteria of paragraph B, but only if the commission finds that the plans will reasonably ensure that the responsibilities and duties of section 4354, subsection 6, will be carried out, that the funds will be managed in order to ensure that they will be available when needed, and that the funds will only be used for decommissioning expenses and the costs of administering the trust fund.

4. Cost of decommissioning. Based upon the plan, the commission shall establish the cost of decommissioning of any nuclear power plant located in the State and shall establish a schedule of monthly payments into the decommissioning trust fund established for that plant as necessary and convenient to meet that cost of decommissioning at the time of closing. The cost of decommissioning shall not include the cost of final disposal of spent nuclear fuel. The schedule shall be established so that contributions received by the licensee are paid to the fund as soon after receipt as practicable. For purposes of cost estimates, the method of decommissioning shall be the method of prompt removal and dismantlement,

unless the United States Nuclear Regulatory Commission or its successor requires another method. The commission shall periodically review the estimated cost of decommissioning in accordance with subsection 6 and based upon that review shall revise the schedule of monthly payments as necessary.

When establishing the cost of decommissioning under this subsection, the commission shall obtain from the licensee, for information purposes, a determination of any possible federal income tax liability related to funds collected for decommissioning purposes until a definitive final determination has been made by the Federal Government that no such liability exists. Notwithstanding any other provision of this subchapter, the licensee may collect additional funds to establish a segregated escrow account for payment of potential federal taxes, as approved by the Federal Energy Regulatory Commission. In the event that no final determination has been made by the Federal Government that no income tax liability exists related to funds collected for decommissioning, the licensee shall exercise all reasonable efforts to obtain such a determination. In no event shall the licensee pay any federal income tax liability amount from the decommissioning trust fund.

5. **Plans required for operation.** Decommissioning financing plans are required as follows.

> **A.** No licensee which receives a certificate of public convenience and necessity may commence operation of a nuclear power plant, unless it has a decommissioning financing plan approved by the commission under subsection 3.

B. The commission shall promulgate an interim decommissioning financing plan by July 13, 1982, for any licensee which does not have a decommissioning financing plan approved under subsection 3. Payments shall commence immediately under the interim decommissioning financing plan and be deposited in an escrow account. That escrow account may be invested in investments permitted for the trust fund under section 4355, subsection 3, paragraph B. When a decommissioning plan is approved and a decommissioning trust fund established, the interim plan shall terminate and the money in that escrow account shall be transferred to the fund.

6. Periodic review of plan. Decommissioning financing plans for nuclear power plants shall be reviewed as follows:

A. If the commission approves a decommissioning financing plan under subsection 3, the commission shall, at least every 5 years and annually in the 5 years preceding scheduled closing, and annually thereafter until decommissioning is completed, review the financing plan to assess its adequacy. If changed circumstances make a more frequent review desirable or if the licensee requests it, the commission may review the plan after a shorter time interval. The review shall include, but not be limited to, the following considerations:

(1) The estimated date of closing the plant;

(2) The estimated cost of decommissioning;

(3) The reasonableness of the method selected for cost estimate purposes;

(4) The size and growth rate of the decommissioning trust fund, taking into account the effect of inflation; and

(5) The adequacy of the plans for financing any shortfall required under subsection 2, paragraph F.

B. After review under paragraph A, the commission may, after public hearing, order such changes in the decommissioning financing plan as it determines necessary to make the plan comply with the criteria in subsection 3, paragraph B.

7. **Physical decommissioning plan.** At least 3 years prior to closing a nuclear power plant, the licensee shall submit a physical decommissioning plan to the Governor and the commission, with updates annually thereafter. In the event of premature closing, the plan shall be submitted as soon as possible.

The commission shall review the plan to ascertain its contents and determine under subsection 6 of the adequacy of the decommissioning fund to pay for that plan, but the commission may not duplicate the health and safety review conducted by the United States Nuclear Regulatory Commission or its successor. The licensee shall file with the physical decommissioning plan a list of all decommissioning-related permits which it must receive from agencies of the State. The licensee shall update its filing annually to indicate the progress of any permit applications which it has undertaken before agencies of the State. The Public Utilities Commission shall transmit copies of this information to all agencies on the

list of permits and shall place this information in a separate file which shall be made available for public inspection. Those agencies shall inform the commission when they issue any licenses or permits or take any other final action. No licensee may decommission a nuclear power plant unless the physical decommissioning plan has been submitted to the commission.

§ 4354. Decommissioning fund committee

1. Establishment of decommissioning fund committee by the licensee. A decommissioning fund committee may be established for a particular nuclear power plant by the licensee operating that plant within one year after July 13, 1982. Upon a finding by the commission that this licensee-established decommissioning fund committee will be able to carry out the responsibilities and duties of subsection 6, that the fund will be managed in accordance with the requirements of section 4355 and that it is in the public interest, the commission may approve establishment of the committee by the licensee. At that time, the Governor may appoint a voting representative on the licensee-established decommissioning fund committee.

2. Establishment of a public decommissioning fund committee. In the event that the licensee elects not to establish its own decommissioning fund committee, or in the event that the commission fails to approve a decommissioning fund committee proposed by the licensee, or the commission elects to terminate that committee for good cause shown, a public decommissioning fund committee shall be established consisting of 7 members, including:

A. The Treasurer of State, who shall act as chairman;

B. A member nominated by the municipal officials of any municipality containing a nuclear power plant;

C. Four members nominated by the Governor, including 2 from the financial community and 2 from the general public; and

D. One member designated by the licensee.

3. **Terms of public decommissioning fund committee members.** Initially, the members appointed by the Governor shall draw lots for terms. There shall be a one-year term, a 2-year term, a 3-year term and a 5-year term. Thereafter, their terms shall be for 5 years. The municipal representative and the licensee's representative shall be named for 5-year terms. In the event of a vacancy, an interim appointment shall be made to fill the unexpired portion of the term. The Treasurer of State shall serve while holding that office. Other members shall serve until their replacements are sworn in.

4. **Compensation.** Members of the decommissioning fund committee shall receive compensation and be reimbursed for expenses as determined reasonable by the commission. They shall be paid from the decommissioning trust fund, for which services are rendered or expenses incurred. Members of a licensee-established committee are not entitled to any compensation under this subsection.

5. **Conflict of interest.** Except for the licensee's representative and members of a licensee-established decommissioning fund committee, members of the committee

shall have no direct or substantial indirect financial interest in any nuclear power plant covered by this subchapter in any company which owns directly or indirectly any portion of a nuclear power plant covered by this subchapter or in any institution involved in managing or handling a decommissioning trust fund.

6. **Responsibilities and duties.** Whether established by the licensee or otherwise, a decommissioning fund committee is responsible for the prudent management of the decommissioning trust fund in order to assure that the principal and income which will have accumulated in the fund at the time of closing the nuclear power plant for which it was established will equal the cost established in the decommissioning financing plan approved by the commission. The specific duties of a decommissioning fund committee are to:

A. Appoint the trustee;

B. Approve selection of other financial managers, if any, by the trustee;

C. Establish investment policy;

D. Evaluate investment policy and trustee performance;

E. Establish procedures for expenditures from the fund for decommissioning and administrative expenses; and

F. Perform other duties it finds necessary to carry out its responsibilities.

7. **Report; audit.** The decommissioning fund committee shall report annually to the Governor, the Legislature and the commission on its activities and the status of the decommissioning trust fund. It shall also report to the

owners of any nuclear power plant in the State on its activities relating to that plant and on the status of the associated fund. The report shall contain a breakdown of all administrative expenses. A decommissioning fund committee shall cause an annual audit to be made of each decommissioning trust fund.

8. Separate committee for each plant. There shall be a separate decommissioning fund committee for each nuclear power plant covered by this subchapter. Members may serve on more than one decommissioning fund committee.

9. Modification. In the event and to the extent that it is necessary in order to establish the tax exempt status of payments to or income of the decommissioning trust fund, the decommissioning fund committee shall, subject to the approval of the commission, modify its structure and procedures, including if necessary changing from any licensee-established trust committee established under subsection 1 to a public trust committee established under subsection 2, provided that no such modification may be contrary to the purpose for which the trust was established under this subchapter.

§ 4355. Decommissioning trust fund

1. Trustee. The decommissioning fund committee shall select a trustee or trustees to execute the policies set by the decommissioning fund committee and manage the money within a decommissioning trust fund in order to ensure that it will be available when needed and, insofar as possible, consistent with protection of the principal, so that it may grow to keep pace with inflation or faster.

Preference may be given to financial institutions incorporated in the State if consistent with their fiduciary responsibility, but only if they meet the criteria for trustees established by the decommissioning fund committee. That committee may, by a majority vote of its entire membership, change trustees at any time. Any trustee shall be subject to the same duties and may exercise the same powers as trustees under Title 18-A, article VII, and the provisions of the decommissioning trust to the extent that they are not inconsistent with this subchapter. The trustee may appoint subsidiary financial managers, subject to approval by the decommissioning fund committee. Any fees charged by the trustee shall be subject to review by the commission.

2. **Tax exemptions.** The following tax exemptions apply to the decommissioning trust fund.

A. Payments to a decommissioning trust fund shall be considered a necessary operating expense of the licensee and shall be tax deductible for state income tax purposes. All income of the fund shall be exempt from state income taxation, as long as the fund is to be used exclusively for the purposes of decommissioning and the licensee may not use the fund for any other purpose.

B. Payments to a decommissioning trust fund are deemed to be a necessary operating expense to the licensee and exempt from federal income tax. It is the legislative intent that all income of the fund be exempt from federal income taxation.

3. **Restrictions.** The following restrictions apply to the decommissioning trust fund.

A. All funds collected by any licensee for decommissioning shall be immediately segregated from the company's assets and amounts not subject to refund or required to pay tax liabilities shall be transferred to the trustee for placement in the decommissioning trust fund established for the licensee's plant. Amounts collected for decommissioning, but subject to refund or required to pay tax liabilities, shall be deposited in a separate escrow account.

B. The assets in a decommissioning trust fund may be invested only in secure assets as follows:

(1) The bonds, notes, certificates of deposit or other obligations issued or guaranteed by the United States or by any agency or instrumentality of the United States;

(2) The bonds, notes, certificates of deposit or other obligations issued or guaranteed by any state or by any agency, instrumentality or political subdivision of any state, provided that securities are rated within the 2 highest grades by any rating service approved by the Superintendent of Banking;

(3) The bonds and other obligations of any United States corporation, provided that they are rated within the 2 highest grades by any rating service approved by the Superintendent of Banking; or

(4) Until a definitive final determination has been made by the Federal Government that the income of the fund is exempt from federal income taxation, the assets in the fund may be invested only in securities exempt from federal income taxation.

The assets in a fund shall not be invested in the securities of the owner of any nuclear power

plant. The decommissioning fund committee may impose such other restrictions as it determines necessary or desirable.

C. Except as provided in section 4354, a decommissioning trust fund shall be administered only by persons not normally involved with operations of the licensee or any owner of a nuclear power plant within the State.

D. Neither the licensee nor any other owner of any nuclear power plant in the State may receive any benefit from funds remaining in the decommissioning trust fund after completion of decommissioning.

E. All income of a fund shall be accumulated and added to the principal of the fund, except as otherwise provided in subsection 5.

F. Any indenture of trust governing the decommissioning trust fund is subject to review and approval by the commission. That indenture of trust shall contain a provision that it shall be amended as necessary to conform to any future changes in state law or rule.

4. Contributions to the fund. The trustee of a decommissioning trust fund shall bill the licensee operating the nuclear power plant for which the fund was established and the licensee shall make payments to the trustee of the fund in amounts and on a schedule determined by the commission in accordance with section 4353, subsection 4.

5. Expenditures from the fund; payments for costs of decommissioning. At the time of decommissioning, the decommissioning fund committee shall authorize the trustee to make payments as necessary from the fund to the licensee to cover actual decommissioning expenses in

accordance with the decommissioning plan authorized by the United States Nuclear Regulatory Commission or its successor. The decommissioning fund committee may not approve any withdrawal for this purpose prior to completion of decommissioning, unless the physical decommissioning plan has been received and reviewed by the commission under section 4353, subsection 7.

The decommissioning fund committee may authorize withdrawals from the fund as necessary to pay reasonable expenses for administering the fund. No other withdrawal may be made prior to the commencement of decommissioning without the approval of the commission and unless the withdrawal is for the purpose of paying reasonable expenses related to decommissioning.

6. Expenditure of money remaining after decommissioning. Upon termination of decommissioning, the commission shall conduct a final audit of the decommissioning trust fund. The commission may by rule, if the public interest requires, establish a decommissioning contingency reserve at that time. If there are assets remaining in the fund attributable to a given plant, after its decommissioning has been completed, those assets shall be returned, in proportion to their payments, to the owners and any other persons who originally made payments to the licensee for decommissioning purposes in accordance with the order or orders of any regulatory agency having jurisdiction. No portion of the remaining assets in a fund may accrue to the benefit of the licensee.

An electric utility in the State which receives remaining decommissioning funds under this subchapter shall

distribute the funds equitably, under the guidance of the commission, to its customers.

7. Commission review for licensee-established committee. Notwithstanding any other section of this subchapter, if the decommissioning fund committee is established by the company under section 4354, subsection 1, withdrawals from the fund shall be reviewed and approved by the commission. No withdrawal may be approved, except for the purpose of paying reasonable expenses related to decommissioning or to the administration of the fund.

8. Separate fund for each plant. There shall be a separate decommissioning trust fund for each nuclear power plant covered by this subchapter. The assets of these funds shall not be commingled in any way.

§ 4356. Responsibility for decommissioning

1. Decommissioning trust fund. In the first instance, the cost of decommissioning shall be paid from the decommissioning trust fund established for the plant being decommissioned.

2. Licensee responsible. If the assets of the decommissioning trust fund are insufficient to pay for the cost of decommissioning, the licensee shall be responsible for the additional cost.

3. Insufficient assets. If the assets of the licensees are insufficient to cover the remaining cost of decommissioning after the decommissioning trust fund is exhausted, the owners are jointly and severally liable for the safe and proper decommissioning of that nuclear

power plant. If, under this subsection, any in-state owner pays decommissioning expenses in excess of its ownership share in the plant, that owner shall have a cause of action to recover that excess from the other owners. The Department of the Attorney General shall assist in bringing such an action.

4. State not financially responsible; protective action. The State shall have no financial responsibility for decommissioning. If the Governor finds that, because of inadequate action by the responsible parties in carrying out decommissioning, protective action is reasonably required to protect the public health and safety, the State may undertake that action. In that case, the Department of the Attorney General shall bring action against the fund, the licensee and the owners to recover the cost of that protective action. Expenses incurred by the Department of the Attorney General in bringing that action shall be paid from the decommissioning trust fund.

5. Additional expense in rates. The commission shall include, as an allowable operating expense, in calculation of authorized rates, additional decommissioning funds actually supplied by an electric utility in the State, to the extent these are just and reasonable.

§ 4357. Procedure, liability and penalties incorporated by reference; construction

To the extent that they are not in conflict with this chapter, chapters 13 and 15 apply to this chapter. This subchapter shall be construed liberally in order to achieve the purposes stated in this chapter.

§ 4358. Cost of review

The licensee shall submit to the commission, with the initial filing or upon a subsequent formal review of a decommissioning financing plan under this subchapter, a filing fee as determined by the commission, but not to exceed $50,000, in order to assist in covering the cost of review by the commission. Within one year after establishment of a decommissioning fund under this subchapter, the licensee may recover the licensing fee from the fund. Money received from the filing fee shall be segregated, apportioned and expended by the commission for the purposes stated in this section, with a report to the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs. Any unexpended funds from the filing fee shall be transferred to the decommissioning trust fund after approval of the plan.

§ 4359. Enforcement

All provisions of this subchapter shall be enforced by the Department of the Attorney General, with the cost of enforcement paid from the decommissioning trust fund.